86-486

Supreme Court, U.S.
FILED
SEP 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1986

WALTER S. COHEN, et al.,

Petitioners

v.

CAROLYN CLARK,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LeROY S. ZIMMERMAN
Attorney General

BY: *JOHN G. KNORR, III
Senior Deputy Attorney
General

ANDREW S. GORDON
Chief Deputy Attorney
General

ALLEN C. WARSHAW
Executive Deputy Attorney
General

*Counsel of Record

Office of Attorney General
15th Fl., Strawberry Sq.
Harrisburg, PA 17120
(717) 783-1471

STATEMENT OF THE QUESTION PRESENTED

Does a mentally retarded person, involuntarily committed to a state institution, have a substantive constitutional right to have the state pay for her care at a private "community living arrangement," where her treating professionals recommend such a placement as the best way to improve her skills, but where it is not neccessary to ensure her physical safety, keep her free from bodily restraints, or prevent the deterioration of the skills she already possesses, and there is no disagreement that institutionalization is preferable to no services at all?

TABLE OF CONTENTS

PAGE

STATEMENT OF THE QUESTION PRESENTED..... i

TABLE OF AUTHORITIES..... iv

PETITION FOR A WRIT OF CERTIORARI..... 1

OPINIONS BELOW..... 2

JURISDICTIONAL STATEMENT..... 2

CONSTITUTIONAL PROVISIONS INVOLVED..... 3

STATEMENT OF THE CASE..... 4

REASONS FOR GRANTING THE WRIT

A. THIS CASE PRESENTS AN UNRESOLVED CONSTITUTIONAL ISSUE OF GREAT IMPORTANCE TO THE ADMINISTRATION OF PUBLIC PROGRAMS FOR THE MENTALLY RETARDED..... 21

B. THE COURT OF APPEALS ERRONEOUSLY APPLIED THIS COURT'S DECISION IN YOUNGBERG V. ROMEO TO CREATE A RIGHT TO TRAINING IN A COMMUNITY LIVING ARRANGEMENT..... 30

TABLE OF CONTENTS
(Continued)

PAGE

C. THE COURT OF APPEALS' DECISION DIRECTLY CONFLICTS WITH DECISIONS OF THE SECOND AND SEVENTH CIRCUITS..... 43

CONCLUSION..... 50

TABLE OF AUTHORITIES

CASES	PAGES
Dandridge v. Williams, 397 U.S 471 (1970).....	49
Halderman v. Pennhurst State School and Hospital, 446 F. Supp. 1295 (E.D. Pa. 1977).....	29, 48
Parham v. J.R., 442 U.S. 584 (1979).....	25
Phillips v. Thompson, 715 F.2d 365 (1983).....	44, 46
Romeo v. Youngberg, 644 F.2d 147 (3d Cir. 1980).....	22
Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239 (1984).....	43, 44
Youngberg v. Romeo, 457 U.S. 307 (1982).....	passim

STATUTES	
Rehabilitation Act of 1973, 29 U.S.C. § 794.....	4
28 U.S.C. § 1254(1).....	3
28 U.S.C. § 1331.....	4
28 U.S.C. § 1343.....	4

TABLE OF AUTHORITIES
(Continued)

PAGES

MISCELLANEOUS

Statistical Abstract of the United States, 1986, 106th ed..... 27

Strategies in Zoning and Community Living Arrangement for Retarded Citizens: Parens Patriae Meets Police Power, 25 Villanova L. Rev. 273 (1980)..... 28

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1986

No.
WALTER S. COHEN, et al.,
Petitioners

v.

CAROLYN CLARK,
Respondent

PETITION FOR A WRIT OF CERTIORARI

Walter S. Cohen, Secretary of the Pennsylvania Department of Public Welfare, together with Jennifer L. Howse, Russell Rice, and S. Reeves Power, subordinate officials in the same Department, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.[1]

---

[1]The petitioners were the appellants in the court of appeals, and the respondent, Carolyn Clark, was the

(FOOTNOTE CONTINUED ON NEXT PAGE)

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a) is reported at 794 F.2d 79. The opinion of the district court (Pet. App. 97a) is reported at 614 F. Supp. 686. The district court's opinion incorporates by reference the parties' stipulation of facts, which is not reported and is reproduced at Pet. App. 221a.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on June 26, 1986, and this petition was filed within 90

(FOOTNOTE CONTINUED)

appellee. The following additional parties were also appellees in the court of appeals, but did not actively participate in the proceedings: Richard C. Surles, C. Everett Cornman, Centralized Comprehensive Human Services, Inc., James F. Wood, Scott McBride and Florence Kirshheimer.

days thereafter, on September 23, 1986. The petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> "No State shall ... deprive any person of life, liberty, or property, without due process of law...."

STATEMENT OF THE CASE

1. In 1956, a Pennsylvania court committed Carolyn Clark to the Laurelton Center, a state institution for the mentally retarded. In 1984, she brought this action seeking, among other relief, an injunction requiring state officials to transfer her to a private "community living arrangement" and to pay for her care there. Her claims are said to arise under the Due Process Clause of the Fourteenth Amendment and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; and the district court therefore had jurisdiction under 28 U.S.C. §§ 1331 and 1343.

Clark filed her complaint and later requested a preliminary injunction. After a two-day hearing, the district court consolidated proceedings on preliminary and permanent injunctive

relief, and issued a permanent injunction granting the relief requested. The petitioners appealed to the Court of Appeals for the Third Circuit, which affirmed the district court.

2. Carolyn Clark is a mildly retarded individual born in 1941. Pet. App. 221a, 250a.[2] She is a legal resident of Philadelphia, Pennsylvania. Pet. App. 221a. Her early family life was, in the district court's words, "tempestuous and disruptive to her development." Pet. App. 99a. She was sexually abused, exploited, and neglected, C.A. App. 532a, 542a, and by the age of 15 had been arrested several

---

[2]The designation "C.A. App." refers to the Appendix filed in this case in the Court of Appeals. "Pet. App." refers to the Appendix to this Petition.

times on various charges. C.A. App. 537a. In June of 1956, when she was 15, Clark was in state custody in a Youth Study Center. C.A. App. 544a.

In 1956, there were no such things as group homes or community living arrangements for the mentally retarded; for a young girl such as Clark, there were few alternatives to institutionalization. C.A. App. 155a, 225a. Those that existed were explored without success. Clark's family, to whom she might have returned, was uncooperative with social services agencies. C.A. App. 158a. For a time, Clark was placed with a foster mother, but that placement ended when she was picked up in a park at 4:30 in the morning with four boys. C.A. App. 544a.

Clark was examined by a psychiatrist, who found her to be "childish and dependent...weak, pliable, submissive, an easy sex victim of unscrupulous persons...incapable of anything like adequate judgment." C.A. App. 538a. She was examined likewise by a psychologist, who found that she "tends to react impulsively with but limited capacity to judge the adequacy of her behavior....She is poorly equipped to handle daily environmental stresses or to act judiciously. Institutionalization may have a stabilizing effect on her personality." C.A. App. 539a. Both examiners recommended institutionalization.

In November of 1956, the Department of Public Welfare filed a petition for commitment in the Philadelphia Court of Common Pleas. C.A. App. 397a. The petition included the results of the psychiatric and psychological examinations, C.A. App. 402a, and it was granted.[3] Clark was committed to the Laurelton State School and Hospital, now known as Laurelton Center. Pet. App. 246a.

Clark would remain at Laurelton Center until 1985, when the district court in this case ordered her transfer

---

[3]The district court found that Clark had not received notice or a hearing on this commitment, Pet. App. 99a. The petitioners contend that this finding is unsupported by any evidence and is therefore clearly erroneous. Since the district court ultimately found that the 1956 commitment proceeding was not unconstitutional, however, the petitioners were not prejudiced by this erroneous finding.

to a private facility. During that time, there was no judicial review of the continued appropriateness of her commitment. Pet. App. 247a. There were, however, periodic professional reviews by the interdisciplinary treatment team responsible for Clark's care at Laurelton Center. C.A. App. 259a-260a, 262a, 428a-530a.

These professional reviews took the form of an annual written assessment of Clark's status by each member of her treatment team.[4] They described, often

---

[4]The most recent package of such reports, done in December of 1984, is included in its entirely in the record. The package includes 10 separate reports: rehabilitative education, residential services, speech and hearing, recreation, social services, nutrition, psychology, vocational services, medicine, and nursing. C.A. App. 437a-472a.

in minute detail, Clark's strengths, weaknesses, needs, progress and capabilities from their various perspectives. These written reports, and the results of a treatment team conference, were then summarized in an Individual Habilitation Plan (IHP), which specifically addressed the resident's suitability for, and needs upon, discharge. C.A. App. 259a-260a, 428a-436a, 473a-490a, 499a-510a, 517a-525a. The resident, family and friends were invited to participate in formulating this Plan. E.g., C.A App. 436a. This annual review was supplemented by less elaborate monthly and quarterly reviews of the resident's status. C.A. App. 259a.

Clark's treating professionals repeatedly concluded that she continued to be in need of care and treatment. At no time did her treatment team recommend that she simply be discharged, and at no time would that have been appropriate. C.A. App. 263a.

Beginning at least in 1976, however, the treatment team concluded that Clark's needs could best be met outside of Laurelton Center, in a community-based residential setting, and recommended that she be placed in a "community living arrangement" designed to provide the services she would continue to need. Pet. App. 252a.[5]

---

[5]The community living arrangement contemplated by the experts who testified for Clark was a house located in a residential neighborhood in Philadelphia, operated by a private organization; and occupied by three mentally

(FOOTNOTE CONTINUED ON NEXT PAGE)

Clark herself wants to live in such a setting. C.A. App. 172a-173a. Beginning in at least 1976, the staff at Laurelton Center repeatedly attempted to obtain a community placement for Clark, without success. Pet. App. 252a, 253a-264a, 271a, 276a; C.A. App. 263a, 404a-405a, 410a-412a, 414a-415a, 422a-425a. Neither Laurelton Center nor the Department of Public Welfare as a whole directly provides any community living arrangements. C.A. App. 264a, 270a. Furthermore, while the Commonwealth,

---

(FOOTNOTE CONTINUED)

retarded residents plus a husband-and-wife team serving as the resident staff. Clark would also be enrolled in a day school to develop her skills in shopping, cooking, and so forth, and to train her for employment. She would, however, be free to come and go as she pleased, free "to walk around the community, go shopping at whatever time, to set [her] own schedule, to plan what [she] want[s] to do." C.A. App. 144a, 227a-36a.

through the Department of Public Welfare, is the ultimate source of payment for such services, again, it does not provide those funds directly.

Rather, funds for community living arrangements are funneled through the county mental retardation programs established pursuant to Pennsylvania's Mental Health and Mental Retardation Act. Within a county, state officials play no role in allocating funds to pay for services for a specific individual. It is the county's responsibility to decide, among the prospective recipients, which will receive the available community placements. C.A. App. 271a.

Accordingly, it was Philadelphia County that had the power, and was requested by state officials, to find a community placement for Clark. As stated

above, those efforts were unsuccessful.

In the meantime, Clark continued to receive care and treatment at Laurelton Center. She "plateaued out" at Laurelton; that is, she absorbed most of the skills and adaptive behaviors the Center could give her, and continuing her stay there would have resulted in little further progress. C.A. App. 223a, 266a. On the other hand, her continued stay permitted her to maintain the achievement level she had already reached. Her own expert conceded that there had been no deterioration in her independent living skills, and that none was to be expected, C.A. App. 168a-169a; and the district court specifically found that there had been no deterioration in her adaptive behavior. Pet. App. 144a.

In recent years, the treatment team at Laurelton Center explicitly addressed the appropriateness of Clark's staying on at the Center, in light of both the continuing unavailability of a community placement and of her continuing need for care and treatment. The consensus of the treatment team was that "until such placement can be secured, [Clark] will continue to benefit from the services provided at Laurelton Center. Laurelton Center remains the most appropriate and least restrictive alternative available to [Clark] at this time." C.A. App. 434a, 488a. Clark produced no evidence, and indeed made no allegation, that this assessment was incorrect. Laurelton Center therefore continued to provide her with services in accordance with the habilitation plan designed by the treatment team.

3. The district court found that this state of affairs violated Clark's procedural and substantive due process rights. The district court rejected Clark's Section 504 claim and rejected likewise the claim that her initial commitment to Laurelton had violated procedural due process. Pet. App. 124a-155a, 158a-164a.[6]

The district court held, however, that her continuing detention at Laurelton had triggered a need for further procedural safeguards, which had not been provided. Pet. App. 164a-182a. The district court strongly suggested, but found it unnecessary to hold, that due process required an adversary hearing before a judicial

---

[6]The court of appeals affirmed these holdings. Pet. App. 25a, n.3, 32a-33a.

officer, Pet. App. 166a-167a, and expressly rejected the idea that the periodic reviews conducted by Clark's treatment team satisfied due process. Pet. App. 167a-176a. In the district court's view, these reviews were a "meaningless exercise" because their recommendation that Clark be provided with a community living arrangement had not been implemented. Pet. App. 176a.

The district court then turned to substantive due process, and held that, given the recommendations of her treatment team, Clark had a constitutional entitlement to placement in a community living arrangement. Pet. App. 191a-206a. The district court therefore issued an injunction ordering the appropriate local officials to develop

such a placement, and ordering the defendant state officials to use state funds to pay for it. Pet. App. 217a-220a.[7]

4. On appeal by the state officials, the Third Circuit affirmed. Judge Gibbons, writing for himself and Judge Sloviter, held that the failure to provide Clark with a community living arrangement had violated "her substantive liberty right to appropriate treatment under [Youngberg v.]Romeo[, 457 U.S. 307 (1982)]," Pet. App. 37a, and her right to procedural due process as well. Pet. App. 35a. He likewise held that, to the extent that the district court's injunction was intended to compensate Clark for past injuries, as opposed to present constitutional

---

[7]The district court did not resolve Clark's claim for damages.

violations, it would not violate the Eleventh Amendment. Pet. App. 19a-24a.

Judge Becker concurred. He disagreed with the majority on the Eleventh Amendment issue, believing that "if Ms. Clark is entitled to [a community living arrangement], it must be because she has a present constitutional entitlement to it, independent of any mistreatment she suffered in the past." Pet. App. 63a (emphasis in original). Judge Becker, extrapolating from the right to treatment articulated in Youngberg, argued for what he called the "modified non-deterioration principle," which he described as follows: "involuntarily civilly committed persons have a right to treatment sufficient to develop their self-care skills to at least the level

at which they would be if the persons had not been institutionalized." Pet. App. 87a. Relying on the district court's remark that, had she not been institutionalized, Clark "most likely" could have lived an "average life," Pet. App. 215a, Judge Becker concluded that substantive due process entitled Clark to placement in a community living arrangement until she acquired the skills she would have learned had she not been institutionalized. Pet. App. 95a-96a.

REASONS FOR GRANTING THE WRIT

The petitioners ask the Court to review the Court of Appeals' holding that a mentally retarded person has a constitutional entitlement to be provided with a community living arrangement. This is an unresolved constitutional issue of great public importance; and the Court of Appeals' erroneous decision directly conflicts with the holdings of two other Courts of Appeal.

A. THIS CASE PRESENTS AN UNRESOLVED CONSTITUTIONAL ISSUE OF GREAT IMPORTANCE TO THE ADMINISTRATION OF PUBLIC PROGRAMS FOR THE MENTALLY RETARDED.

In Youngberg v. Romeo, 457 U.S. 307 (1982), this Court addressed for the first time the substantive rights of the institutionalized mentally retarded. The Court held that the mentally

retarded plaintiff in Youngberg enjoyed constitutionally protected interests in "reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests." Id., at 324. The Court emphasized, however, the limited nature of its holding, id., at 319, and emphasized as well its preference for "incremental decision-making" in this novel area. Id., at 319 n. 25, quoting Romeo v. Youngberg, 644 F.2d 147, 183 (3d Cir. 1980)(Aldisert, J., dissenting). The Court therefore did not address the "difficult question whether a mentally retarded person, involuntarily committed to a state institution, has some general constitutional right to training per se," id., at 318, nor did the Court say whether, or to what extent, a right

to training would exist for mentally retarded persons whose circumstances differed from those of the Youngberg plaintiff. Id., at 319 (holding limited to the circumstances and record presented); at 325 (Blackmun, J., concurring)(difficult and important issues left unresolved).

This case presents the question of whether Youngberg compels the state to extend a right to training in a setting where the factual circumstances and the relief sought differ markedly from those in Youngberg. Nicholas Romeo, the plaintiff in Youngberg, was a profoundly retarded man who conceded that no amount of training would make possible his release from the state institution where he lived, id., at 309, 317. He required training simply to allow him to live, within the institution, in reasonable safety and in reasonable freedom from

bodily restraints, id., at 317-18, and he sought to establish his right to receive that training in the institution.

Carolyn Clark on the other hand, is a mildly retarded woman who, with the proper training, could eventually lead a semi-independent life with minimal support services, Pet. App. 107a-108a. She does not, however, require training to ensure her physical safety or freedom from physical restraints, C.A. App. 257a-58a. She seeks, not to improve conditions within the institution, but to establish an entitlement to training outside the institution altogether.

The Court of Appeals held that states are constitutionally required to provide the mentally retarded whatever optimal services the treating professionals recommend, and are constitutionally barred from offering anything

less.[8] Cost is not a legitimate consideration, nor may the states consider

---

[8]The courts below approached this case as if it involved two distinct claims: procedural due process and substantive due process. In reality, the procedural due process holding is entirely dependent on the substantive due process holding, and rises or falls with it.

The courts below began their analyses by addressing the procedural due process rights of a mentally retarded person facing involuntary commitment. Applying the Court's decision in Parham v. J.R.,442 J.S. 584 (1979), they correctly concluded that Clark's initial commitment was procedurally sound. Pet. App. 32a, 158a. They then turned to the question of what, if any, further procedural safeguards were required for a person, like Clark, committed for an indefinite period.

The petitioners conceded that Clark's continuing detention implicated a protected liberty interest, and further conceded that, in the case of an indefinite commitment, due process required at least the opportunity for some sort of periodic review of its continuing appropriateness. The question then, of course, was the familiar one of "what process is due?"

(FOOTNOTE CONTINUED ON NEXT PAGE)

the competing demands of others. In the Third Circuit's view, it must be all or

---

(FOOTNOTE CONTINUED)

At this point, the courts below shifted their ground. Abandoning the question of what process was due to protect Clark from erroneous detention--which they never did resolve--they focused instead on the issue of a community living arrangement. The professional reviews of Clark's status had concluded that, while institutionalization was better than release, a community living arrangement would be better still; and the courts below held that the failure to provide such a placement made the review a "meaningless exercise" that violated procedural due process. Pet. App. 176a, 34a-35a.

The right to procedural due process only exists, of course, where there is some substantive interest for it to protect, and the holding below--purportedly resting on procedural grounds--makes sense only if there exists some substantive entitlement on Clark's part to be provided with a community living arrangement. The courts below found such an entitlement in the due process clause. Pet. App. 37a, 199a. This holding is the keystone of the case; if it falls, the procedural holding falls with it.

nothing; there is no place for reasonable, if imperfect, compromises.

In this case, that constitutional principle required Pennsylvania to move Clark from an institutional setting to a community-based living arrangement because her treating professionals determined that she would benefit from such a move. As recently as December of 1982, there were nearly 125,000 mentally retarded persons residing in state-operated institutions similar to the one in which respondent lived. Statistical Abstract of the United States, 1986, 106th ed. It is generally accepted that most mentally retarded persons "would be better off" in community based facilities than in institutional placements. Boyd, Strategies in Zoning and Community Living Arrangement for Retarded Citizens:

Parens Patriae Meets Police Power, 25 Villanova L. Rev. 273, 274 (1980). Thus, the constitutional principle established by the Third Circuit in this case theoretically requires each of the states to create and provide community-based living arrangements for most, if not all, of the mentally retarded persons who are now residing in state-operated institutions.

Thus viewed, the effects of this holding on the ability of states to design and fund programs for the mentally retarded, and others, are as predictable as they are undesirable. Some states may acquiesce, giving the mentally retarded a preferred position in the allocation of funds at the expense of other, equally deserving,

programs.[9] Some may pressure their treating professionals to trim their recommendations to fit their budgets. Some may simply stop providing for the mentally retarded altogether. The importance of this issue to public mental retardation programs cannot be overstated. The issue in Youngberg--where the Court granted review "because of the importance of the question," 457 U.S. at 314--was the manner in which states would be required to operate the

---

[9] Ironically, Clark herself was the victim of just such a well-intentioned judicial effort to help the mentally retarded. The district court found that the petitioners were "struggling" to provide court-ordered placements for the Pennhurst plaintiffs, to the point where no money was available to create placements for others, such as Clark. Pet App. 120a, 241a. See Halderman v. Pennhurst State School and Hospital, 446 F.Supp. 1295 (E.D. Pa. 1977)(subsequent history omitted).

institutions they had chosen to establish; the issue here is whether states, having established such institutions, are constitutionally obligated to pay for other services as well. The effects of such an obligation for other areas can only be conjectured. If the mentally retarded have a substantive constitutional right to services, even when not institutionalized, it is difficult to see why the mentally ill, the physically ill and the disadvantaged generally do not have similar entitlements.

B. THE COURT OF APPEALS ERRONEOUSLY APPLIED THIS COURT'S DECISON IN YOUNGBERG V. ROMEO TO CREATE A RIGHT TO TRAINING IN A COMMUNITY LIVING ARRANGEMENT.

The Court of Appeals held that Clark enjoys a substantive liberty interest in having the state pay for

her mental retardation services outside of a state institution. The court based this holding upon the testimony of the treating professionals and other experts, and upon its reading of Youngberg v. Romeo, supra. Pet. App. 35a-37a.

In Youngberg, this Court held that a mentally retarded person, involuntarily committed to a state institution, retains protected liberty interests in food, shelter, clothing, and medical care; in conditions of reasonable safety; in freedom from unreasonable bodily restraints; and in such training as may be required by these interests. 457 U.S. at 324. The Court emphasized that, "[i]n determining whether the state has met its obligations in these respects, decisions made by the appropriate professionals

are entitled to a presumption of correctness." Ibid.

In this case, the district court found that all of the professionals agreed that Clark ought to be receiving services in a non-institutional setting, and found that such a setting would be less restrictive than Laurelton Center. Pointing out that in Youngberg, this Court required deference to the judgment of treating professionals, the district court reasoned that the failure to provide such services violated the Fourteenth Amendment, Pet. App. 199a, and the Court of Appeals agreed. Pet App. 37a. This analysis, while superficially appealing, is fundamentally flawed.

The Court of Appeals' first error was to extend Youngberg outside of the

institutional setting in which it arose. In Youngberg, this Court started its analysis from the "established principle" that "[a]s a general matter, a state is under no constitutional duty to provide substantive services to those within its border." 457 U.S. at 317. It is only when a person is "institutionalized--and wholly dependent on the State," that there arises a constitutional duty to provide services, for it is only then that the failure to provide services can constitute a "deprivation" by the state within the meaning of the Fourteenth Amendment. Ibid.

To divorce the duty to provide services from the fact of institutionalization--to say, as the Court of Appeals said, that the state has an affirmative duty to provide services outside of an institution--is to cut Youngberg loose

from its constitutional moorings, and to turn the Fourteenth Amendment into a general entitlement program for the mentally retarded, and perhaps others was well.

Judge Becker, in his concurrence, recognized and attempted to avoid this problem by positing that "Clark is still involuntarily committed even while at the CLA....[She] cannot leave the CLA permanently without permission, and...she is not free to enjoy all lawful activities." Pet. App. 91a. There is no support in the record for this supposition. To the contrary, the community living arrangement designed for Clark is an open facility, privately operated, in which "there's no such thing as going AWOL," C.A. App. 144a, and in which Clark is free to do "all those things that normal people do in the community." C.A. App. 235a. Clark,

as the majority opinion recognized, has been released from the custody of the state, Pet. App. 13a; and the state has no authority to compel her to remain in a community living arrangement. There is thus no sense in which she is "institutionalized--and wholly dependent on the state" within the meaning of Youngberg.

The Court of Appeals' second error was to ignore Youngberg's teaching that any right to training must be rooted in an "identifiable liberty interest," in favor of a general constitutional right to receive whatever services are recommended by the treating professionals. Where, as here, there is professional unanimity on what constitutes the optimal course of training, the Court of Appeals held that it is a deprivation of due process for the state to fail to provide that training.

This is erroneous. Even as applied to services within an institution, Youngberg cannot be read so broadly. Under Youngberg, services are constitutionally mandated not when professionals recommend them, but when they are necessary to effectuate "identifiable liberty interests." 457 U.S. at 319, n. 25. The Court specifically said that the "imposition of any affirmative duty on a State" must be supported by a "constitutional predicate," ibid.

Thus, the respondent in Youngberg, who had a liberty interest in freedom from unnecessary bodily restraints, had a right to "minimally adequate" training to reduce the aggressive behavior that occasioned those restraints. 457 U.S. at 322. Professional judgment entered the picture, not as the source of the entitlement to services, but as the measure of their minimal adequacy once

they were identified against the touchstone of an "identifiable liberty interest."

None of the liberty interests identified in Youngberg or elsewhere are implicated in this case. Clark had a liberty interest in remaining free from unreasonable bodily restraints, but there was no finding that she was so restrained; to the contrary, Clark had the freedom of the grounds at Laurelton Center, and the freedom to leave the grounds as well. C.A. App. 257a-258a. She had a liberty interest in reasonably safe conditions, but there was no finding, and indeed no allegation, that she required training to effectuate this right.

Nor was there any danger that, by remaining at Laurelton Center, Clark would lose any of the skills she already had. See Youngberg, 457 U.S. at 327-29

(Blackmun, J., concurring)(mentally retarded may have constitutional right not to regress while in state custody). Her own expert conceded, and the district court found, that there had been no deterioration in her self-care skills, and that none was to be expected. C.A. App. 168a-169a; Pet. App. 114a.

It cannot be said, then, that Clark was denied any services required by an "identifiable liberty interest," for no such interest was established. Even if such an interest had been identified, however, the Court of Appeals' analysis would still be flawed by its failure to appropriately address the services required by it.

Under Youngberg, it is clear that the Constitution requires a state to provide only those services that are

"minimally adequate" to serve an identified liberty interest, 457 U.S. at 322; and that "decisions made by the appropriate professionals are entitled to a presumption of correctness," 457 U.S. at 324, which is rebutted only when those decisions reflect a "substantial departure from accepted professional judgment." 457 U.S. at 323. In this case, however, the district court made no finding that the services received by Clark fell outside the range of possible professional judgment; and the record refutes any suggestion that Clark's care was not based upon professional judgment. C.A. App. 434a (treatment team's opinion that Clark would continue to benefit from placement at Laurelton Center, which was the "most appropriate and least restrictive setting" available); C.A. App. 488a (same). See

generally C.A. App. 428a-530a (treatment teams' assessments, 1981-84).

Rather, the district court and the Court of Appeals relied on the fact that all of the professionals agreed that placement in a non-institutional setting would be the best thing for Clark. Pet. App. 199a. This was an error. It is one thing to identify an optimal course of treatment; it is another thing entirely to say that some alternative course is outside the bounds of acceptable practice.

The Court of Appeals also relied heavily on the district court's remark that, had she never been institutionalized in the first place, Clark could "most likely" have lived an "average life." Pet. App. 16a, 87a, 215a. The district court in turn relied on the testimony of a psychologist called by

Clark, who gave it as his opinion that, absent institutionalization, Clark would today be a "normally-functioning individual in her community." C.A. App. 138a. The significance of this point is not clear[10] --the district court held that Clark's initial institutionalization had not deprived her of due process, Pet. App. 158a, and the Court of Appeals affirmed, Pet. App. 32a--but it is clear that, in making it, the courts below failed to accord the deference required by Youngberg to the decisions of treating professionals.

---

[10]Except for Judge Becker's concurrence. Judge Becker would have held that Clark was constitutionally entitled to whatever training would enable her to match the achievements she would have attained had she never been committed. Pet. App. 87a. This point is therefore critical to Judge Becker's theory of the case.

Clark's initial commitment was supported by the recommendations of a psychiatrist and a psychologist, both of whom had examined her and who concluded that, in the absence of institutionalization, she would continue to be sexually abused, exploited and neglected; that she was incapable of handling the daily stresses of what the district court calls an "average life"; and that institutionalization might have a stabilizing effect. C.A. App. 538a-39a. Under Youngberg, these assessments were entitled to a "presumption of correctness," 457 U.S. at 324, that is not overcome merely because a plaintiff can find an expert who is willing to testify, 30 years later, that he disagrees with them.

To summarize: in Youngberg the Court held only that mentally retarded persons have a constitutional right,

when they are institutionalized, to receive minimally adequate services that are necessary in light of specific liberty interests. In contrast, the Court of Appeals has required Pennsylvania to provide an optimal plan of services, not tied to any identifiable liberty interest, and to do so outside of an institution. This goes far beyond anything contemplated by Youngberg, is constitutionally untenable, and should be reversed.

C. THE COURT OF APPEALS' DECISION DIRECTLY CONFLICTS WITH DECISIONS OF THE SECOND AND SEVENTH CIRCUITS.

The Third Circuit's holding, that the failure to provide Clark with a community living arrangement violated her Youngberg right to training, directly conflicts with the holding of the Second Circuit in Society for Good

Will to Retarded Children v. Cuomo, 737 F.2d 1239 (1984), and with the Seventh Circuit's holding in Phillips v. Thompson, 715 F.2d 365 (1983).[11]

Society for Good Will, supra, was a class action brought on behalf of all the residents of a state institution in New York. As in this case, "[a]ll experts, both defendants' and plaintiffs', agreed that many [residents] could be safer, happier and more productive outside the institution in small community residences. Their professional judgment was that transfers should be made as soon as the facilities could be made available." Id., 737 F.2d at 1248, quoting 572 F. Supp. at 1347. As in this case, the district court

---

[11]Judge Becker, in his concurrence, recognized this conflict, Pet. App. 89a., n. 12. The majority opinion does not mention these cases.

concluded that "[t]he Constitution mandates community placement" for those residents and ordered the state to provide them. Ibid.

On appeal, the Second Circuit reversed. The court held that "no...resident is deprived of freedom from undue restraint or any other constitutional right merely because he or she lives at [a state institution].... [M]ere residence in an institution or school for the mentally retarded, without more, does not violate due process." Id., 737 F.2d at 1247. The court expressly rejected the idea, embraced by the Third Circuit in this case, that there exists a constitutional right to whatever training the professionals agree would be best. "Even if every expert testifying at trial agrees that another type of treatment or residence setting might be better, the

federal courts may only decide whether the treatment or residence setting that actually was selected was a 'substantial departure' from prevailing standards of practice." Since, as in this case, there was no evidence to support such a finding, the Second Circuit reversed.

Phillips v. Thompson, supra, was also a class action on behalf of mildly and moderately retarded residents of a state institution. Like Clark, they were not subjected to bodily restraints; their movements were limited only by the "reasonable requirements of caring for a large number of handicapped people in an institutional setting." Id., 715 F.2d at 368. Like Clark, they required no training to ensure their physical safety or freedom from restraint. Ibid. Like Clark, however, they complained that their very residence in the institution

unduly restricted them and deprived them of appropriate training, and they asked that Illinois be ordered to provide them with community placements.

The Seventh Circuit rejected this claim. Relying on this Court's statement in Youngberg that, "[a]s a general matter, a state is under no constitutional duty to provide substantive services," the court of appeals held that there is no "substantive due process right under the fourteenth amendment to care in a community residential setting." Id., 715 F.2d at 367. The court also held that the residents had not been unduly restrained or deprived of any right to training recognized in Youngberg. Id., 715 F.2d at 368.

The holdings in these two cases cannot be reconciled with the Third Circuit's holding in this case. In

addition, these two class actions underscore the importance of the constitutional issue in this case by demonstrating the frequency with which it arises.[12] Contrary to the district court's assertion that this case presents "extraordinary facts," Pet App. 206a, n. 15, Clark's situation--in which a state provides imperfect services in preference to no services at all--is,

---

[12]It arose also in the lengthy Pennhurst litigation, another class action which twice reached this Court. Halderman v. Pennhurst State School and Hospital, 446 F. Supp. 1295 (E.D. Pa. 1977)(finding right to community living arrangements on federal statutory, state statutory and federal constitutional grounds), aff'd in part and rev'd in part, 612 F.2d 84 (3d Cir. 1979)(reaching federal statute only), rev'd, 451 U.S. 1 (1981), on remand, 673 F.2d 647 (3d Cir. 1982)(reaching state statute only), rev'd, 465 U.S. 89 (1984), settlement approved, 610 F. Supp. 1221 (E.D. Pa. 1985). The constitutional issue was thus never resolved.

in a world of limited resources, all too common.

The Second and Seventh Circuits have heeded this Court's admonition that, in their effort to cope with the complex problem of mental retardation, the states should not be forced to "choose between attacking every aspect of a problem or not attacking the problem at all." Youngberg, 475 U.S. at 317, quoting Dandridge v. Williams, 397 U.S. 471, 486-87 (1970). The Third Circuit has not. This Court should therefore resolve the conflict among the circuits on this important issue.

CONCLUSION

For the foregoing reasons, the petitioners request the Court to issue a writ of certiorari to review the judgment of the court of appeals, and then reverse that judgment.

Respectfully submitted,

LeROY S. ZIMMERMAN
Attorney General

BY: *JOHN G. KNORR, III
Senior Deputy Attorney General

ANDREW S. GORDON
Chief Deputy Attorney General

ALLEN C. WARSHAW
Executive Deputy Attorney General

*Counsel of Record

Office of Attorney General
Commonwealth of Pennsylvania
15th Fl., Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

DATE: September 23, 1986

86-486

(2)

NO _____

Supreme Court, U.S.
FILED
SEP 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1986

WALTER S. COHEN, et al.,
Petitioners

v.

CAROLYN CLARK,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPENDIX

LeROY S. ZIMMERMAN
Attorney General

BY: *JOHN G. KNORR, III
Senior Deputy Attorney
General

ANDREW S. GORDON
Chief Deputy Attorney
General

ALLEN C. WARSHAW
Executive Deputy Attorney
General

Office of Attorney General
15th Fl., Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

TABLE OF CONTENTS

	PAGE
OPINION OF THE COURT OF APPEALS	3a
OPINION AND ORDER OF THE DISTRICT COURT	97a
AGREED STIPULATION OF FACTS	221a

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 85-1452

CAROLYN CLARK

v.

WALTER S. COHEN, Individually and in his official capacity as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania, JENNIFER L. HOWSE, Individually and in her official capacity as Deputy Secretary for Mental Retardation of the Pennsylvania Department of Public Welfare, Commonwealth of Pennsylvania, RUSSELL G. RICE, JR., Individually and in his official capacity as Commissioner of Mental Retardation, Southeast Region, Department of Public Welfare, Commonwealth of Pennsylvania, S. REEVES POWER, Individually and in his official capacity as Superintendent of Laurelton Center, RICHARD C. SURLES, Individually and in his official capacity as the Mental Health and Mental Retardation Administrator of Philadelphia County, C. EVERETT CORNMAN, CENTRALIZED COMPREHENSIVE HUMAN SERVICES, INC., JAMES F. WOOD, in his official capacity as the Acting Director of the JFK Community Mental Health/ Mental Retardation Program, SCOTT McBRIDE and FLORENCE KIRSHHEIRMER

Walter S. Cohen, Jennifer L. Howse, Russell Rice and S. Reeves Power,
Appellants

(D.C. Civil NO. 84-3383)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Argued: March 3, 1986
Before: GIBBONS, SLOVITER and
BECKER,
Circuit Judges

(Opinion Filed: June 26, 1986)

LeROY S. ZIMMERMAN
Attorney General

JOHN G. KNORR, III (ARGUED)
Senior Deputy Attorney
General

ANDREW S. GORDON
Chief Deputy Attorney
General

ALLEN C. WARSHAW
Executive Deputy Attorney
General

Office of Attorney General
15th Fl., Strawberry Square
Harrisburg, PA 17120

Attorneys for Appellants

STEPHEN F. GOLD, ESQUIRE
(Argued)
1315 Walnut St.
Suite 1632
Philadelphia, PA 19107

ILENE W. SHANE, ESQUIRE.
CARYL ANDREW OBERMAN, ESQUIRE
2100 Lewis Tower Building
Philadelphia, PA 19102

Attorneys for Appellee

THOMAS K. GILHOOL, ESQUIRE
JUDITH A. GRAN, ESQUIRE
TIMOTHY A. COOK, ESQUIRE
PUBLIC INTEREST LAW CENTER
OF PHILADELPHIA
1315 Walnut Street,
Suite 1632
Philadelphia, PA 19107

Attorneys for Amicus Curiae

OPINION OF THE COURT

GIBBONS, Circuit Judge:

Walter S. Cohen, Secretary of the Department of Public Welfare of Pennsylvania, Jennifer L. Howse, Deputy Secretary for Mental Retardation of that Department, Russell G. Rice, Jr., Commissioner of Mental Retardation, Southeast Region of that Department, and S. Reeves Power, Superintendent of Laurelton Center (the Commonwealth defendants) appeal from an injunction entered by the district court on June 21, 1985, directing that they release the plaintiff, Carolyn Clark, from Laurelton Center and pay for a program of services for Clark outside that state institution. The injunction resolves Clark's claims for

injunctive relief, but not her claims for money damages. We have jurisdiction under 28 U.S.C. § 1292(a)(1)(1982). We affirm.

I.

Clark is a forty-five year old woman who was confined at Laurelton Center, a state run institution, for care of the mentally retarded from the time she was fifteen years old until she was released as a result of the order appealed from. In July of 1984 she filed a complaint against the Commonwealth defendants, and several officials of and contractors for the County of Philadelphia (County defendants), alleging that her confinement at Laurelton violated her first and fourteenth amendment rights and her rights under several

federal and state statutes. The complaint as amended sought declaratory, injunctive, and monetary relief. Clark contended that she should not have been confined at Laurelton, and that as a result of her long confinement she could not immediately function in a completely unstructured environment. Thus she sought short-term placement in a community living arrangement (CLA) supervised by the County defendants.[1]

After extensive discovery, the parties filed a 183-pargragraph stipulation as to the truth, but not necessarily the relevancy, of certain facts.

---

[1]The relationship between the counties and the Commonwealth with respect to community living arrangements is described in detail in Halderman v. Pennhurst State School & Hosp., 612 F.2d 84, 92-93 (3d Cir. 1979)(en banc), rev'd and remanded on other grounds, 451 U.S. 1 (1981).

Prior to any hearing the County defendants and Clark reached a settlement under which they agreed to place her in a CLA within 120 days, provided the Commonwealth defendants paid the cost of such placement. The County defendants also agreed to develop for Clark a community placement best suited to her needs, and to have expert witnesses testify on her behalf as to the appropriateness of the proposed community placement and the necessity for such placement.

On May 28, 1985 the district court commenced a hearing on Clark's application for preliminary injunctive relief. Her counsel represented to the court that he would present, in addition

to the stipulated facts, the testimony of several witnesses, but that the stipulation and those witnesses would comprise Clark's entire case on injunctive relief. The court therefore treated the hearing as an application for a permanent injunction. Clark presented her own testimony, the testimony of her caseworker at Laurelton, of the Superintendent of Laurelton, of the Director of Social and Rehabilitative Services at Laurelton, of the Director of the Bureau of Planning and Resource Allocation of the Department of Public Welfare, and of several expert witnesses. The stipulation of facts executed by the parties was admitted into evidence, together with fifty-six exhibits. The exhibits included the Laurelton records with respect to Clark's stay there. The attorney for the Commonwealth cross-

examined the witnesses offered on Clark's behalf, but introduced no evidence in opposition to the application for injunctive relief.

On June 21, 1985 the trial court filed detailed findings of fact and conclusions of law. Noting that the parties had entered into a comprehensive stipulation of facts, the trial court wrote that his narrative statement "together with the stipulation constitutes my findings of fact." Clark v. Cohen, 613 F. Supp. 684, 686 (E.D. Pa. 1985). Thus in reviewing the trial court's findings of fact we must look both to the narrative statement and to the stipulation. Reference to those findings will be made hereafter as relevant to the Commonwealth defendants' legal contentions.

The trial court held that Clark had been deprived of liberty without procedural due process of law and of substantive liberty interests guaranteed by the fourteenth amendment. The court, therefore, determined that she was entitled to injunctive relief. The court entered an order directing the County defendants to take those steps on Clark's behalf which they had agreed to take in the settlement; namely developing a program of community services for her which would permit her to live in a CLA. The court further instructed the Commonwealth defendants to "immediately commit to Philadelphia Mental Health Mental Retardation those funds necessary to pay for the program of community services" and to "arrange for

the transfer of plaintiff to this program." Joint Appendix at 50. This appeal by the Commonwealth defendants followed.

II.

Because the injunction was not stayed, the County defendants proceeded to develop a plan for Clark's placement in a CLA, and she was released from Laurelton. On February 2, 1986 reports in the press disclosed that the Commonwealth defendants no longer opposed her release, and would not seek her return if they prevailed on appeal.[2] This court requested counsel to comment on the possible mootness of the appeal in

---

[2]The Philadelphia Inquirer, February 2, 1986, § I, at 1, col. 1.

light of the fact that the Commonwealth defendants no longer sought to have Clark returned to Laurelton.

Both parties contend, and we agree, that the appeal is not moot. A mootness ruling would require that the underlying order be vacated. See United States v. Munsingwear, 340 U.S. 36, 39-40 (1950). That might result in the withdrawal of community services now being furnished by the County defendants, since Clark's settlement with them is contingent upon funding by the Commonwealth. The Commonwealth, while it has no intention of seeking her return to Laurelton, is unwilling to continue such funding if it can obtain relief from the funding provision in the injunction. While a vacation of the injunction would accomplish all the relief the Commonwealth now seeks, it

would deprive Clark of a significant protection. Thus we must address the merits of the Commonwealth defendants' appeal.

III.

The appeal presents two independent contentions. The Commonwealth defendants first urge that, assuming they violated Clark's substantive and procedural rights, the eleventh amendment bars any relief other than an order releasing her from their custody. They contend, alternatively, that no relief was proper because no violations of Clark's constitutional rights ever occurred.

A.

The Eleventh Amendment Contention

The district court found that the violation of Clark's constitutional rights by her long, illegal confinement at Laurelton without proper treatment caused a deterioration in her ability to function at the present time in an unstructured environment. "But for the then well-intentioned intervention of the state," the court observed, "Ms. Clark could most likely have lived an average life." 613 F. Supp. at 707. The Commonwealth stipulated that "[i]n the opinion of [James] Pelter and Elizabeth Kaster, [two members of the] Laurelton Center social service staff, Carolyn Clark's need for support services stems primarily from her institutionalization since age 15." Joint Appendix at 376. No evidence conflicting with that opinion was offered

by the Commonwealth defendants. They stipulated further that "[s]ince at least 1976, it has been the recommendation of the team at Laurelton Center that Carolyn Clark be placed in a community living arrangement." Joint Appendix at 377. It was stipulated that as long ago as 1976 her Laurelton case worker recommended "that she would be most appropriate for a supervised foster home or group placement." Joint Appendix at 378. It was also stipulated that it was the opinion of Laurelton case worker James Pelter, who was familiar with Clark's case, "that her major difficulties were in the behavioral area and that these difficulties were largely due to being institutionalized since age 15." Joint Appendix at 383. Having stipulated that their own professional staff members attributed Clark's present

need for supervision to her long institutionalization, and having offered no contrary evidence, the Commonwealth defendants are in no position to question the trial court's finding that the violations of her rights caused such deterioration of her ability to cope in society that she needs some form of supervised remediation if she is ever to be able to do so.

Indeed the Commonwealth defendants do not seriously dispute that Clark's need for present remediation is the result of her long confinement. In their initial brief, they argue that she sought and the trial court recognized a constitutional right to treatment outside an institution unrelated to any prior violation of her rights. Appellants' Brief at 17-19. Clark's brief points out, quite correctly, however,

that the trial court did nothing of the kind; rather, it ordered a remedy for the past constitutional violations which it found. Appellee's Brief at 37-38.

Subsequently, the Commonwealth defendants brought forth the argument we now address; namely that the supervised community living arrangement which has been ordered, being a form of remediation or compensation for past injuries, is barred by the eleventh amendment, even in a suit against state officers seeking equitable relief. Appellants' Reply Brief at 3-9. The Commonwealth defendants note, correctly, that the equitable relief which the trial court ordered--the development and implementation of a plan for Clark's placement in a CLA until she can function in society without supervision--involves the expenditure of Commonwealth funds.

They rely on Edelman v. Jordan, 415 U.S. 651 (1974), as authority for the proposition that equitable relief requiring the expenditure of state funds to remedy past wrongs is never permissible.

The precise contention made by the Commonwealth defendants has been rejected by the Supreme Court. In Milliken v. Bradley, 433 U.S. 267 (1977) (Milliken II), the governor and other state officials of Michigan, who had been found to have participated in the maintenance of an unconstitutionally segregated school system in Detroit, were ordered to fund one-half of the remedial educational programs ordered for the purpose of undoing the harm done to black pupils by prior segregated schooling. Id. at 275-77. Relying on Edelman, the state officials argued that

the eleventh amendment barred such "compensatory" relief. The Court resoundingly, and in this respect unanimously, rejected that contention, writing:

> The decree to share the future costs of educational components in this case fits squarely within the prospective-compliance exception reaffirmed by Edelman. That exception, which had its genesis in Ex parte Young, 209 U.S. 123 (1908), permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury. 415 U.S. at 667. The order challenged here does no more than that. The decree requires state officials, held responsible for unconstitutional conduct, in findings which are not challenged, to eliminate a de jure segregated school system. More precisely, the burden of

state officials is that set forth in Swann [v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971)]--to take the necessary steps "to eliminate from the public schools all vestiges of state-imposed segregation." 402 U.S. at 15. The educational components, which the District Court ordered into effect prospectively, are plainly designed to wipe out continuing conditions of inequality produced by the inherently unequal dual school system long maintained by Detroit.

These programs were not, and as a practical matter could not be, intended to wipe the slate clean by one bold stroke, as could a retroactive award of money in Edelman. Rather, by the nature of the antecedent violation, which on this record caused significant deficiencies in communications skills--reading and speaking--the victims of Detroit's de jure segregated system will continue to experience the effects of segregation until such future time as the remedial programs can

> help dissipate the continuing effects of past misconduct. Reading and speech deficiencies cannot be eliminated by judicial fiat; they will require time, patience, and the skills of specially trained teachers. That the programs are also "compensatory" in nature does not change the fact that they are part of a plan that operates prospectively to bring about the delayed benefits of a unitary school system. We therefore hold that such prospective relief is not barred by the Eleventh Amendment.

Id. at 289-09 (footnotes omitted). Milliken II is therefore controlling unless, as the Commonwealth urges, it has since been overruled. Somewhat obliquely the Commonwealth suggest that Milliken II was overruled in Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984). To the contrary, that case reconfirmed that "the federal

court may award an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief." Id. 102-03 (emphasis supplied). No monetary relief has thus far been awarded to Clark.

Given the square holding in Milliken II that a federal court may order state officials to fund from the state treasury remedial measures found necessary to undo the harmful effects of past constitutional violations, we hold that the Commonwealth defendants' eleventh amendment argument is meritless.

B.

The Violations

Having rejected their eleventh amendment contention, we must address the Commonwealth defendants' contention that Clark's constitutional rights were

not violated.[3] The trial court held that she had been confined at Laurelton

---

[3]Clark suggests that the relief afforded to her was required by section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (1984). The trial court rejected this contention. See 613 F. Supp. at 690-96. Section 504 prohibits discrimination against the handicapped in federally funded programs. It imposes no affirmative obligations on the states to furnish services. See Southeastern Community College v. Davis, 442 U.S. 397, 411 (1979); Kentucky Ass'n for Retarded Citizens v. Conn., 674 F.2d 582, 585 (6th Cir. 1982), aff'g, 510 F. Supp. 1233, 1243-44 (W.D.Ky. 1980); Halderman v. Pennhurst State School & Hosp., 612 F.2d 84, 120-21 (3d Cir. 1979)(en banc)(Seitz, Jr., dissenting), rev'd and remanded on other grounds, 451 U.S. 1 (1981); Sabo v. O'Bannon, 586 F. Supp. 1132, 1137 (E.D. Pa. 1984); Manecke v. School Bd. of Pinellas County, Fla., 553 F. Supp. 787, 790 n. 4 (M.D. Fla. 1982); Garrity v. Gallen, 522 F. Supp. 171, 209 (D.N.H. 1981). The district court found that Clark failed to prove that she was discriminated against on the basis of her handicap. That finding is not clearly erroneous. Thus section 504 does not provide a statutory ground for affirmance which would avoid the necessity of reaching the constitutional law issues on which she prevailed.

in violation of substantive liberty interests and procedural due process rights.

In 1956 Clark, a fifteen-year old Philadelphia resident, was involuntarily and indefinitely committed to Laurelton as a result of a petition filed pursuant to section 326 of the Mental Health Act of 1951. See Pa. Stat. Ann. tit. 50, § 1201 (Purdon 1952), repealed by Mental Health and Mental Retardation Act of 1966, 1966 Pa. Laws 96 (codified at Pa. Stat. Ann. tit. 50, §§ 4101-4704 (Purdon 1969). The petition was filed on November 8. 1956 and approved by a state court the next day. Clark received no notice of the petition, and no hearing was held on it. On November 11, 1956 she was transported to Laurelton, in Union County,

Pennsylvania, at least four hours away from her Philadelphia home. Laurelton is an institution housing severely mentally retarded persons. Although the petition which resulted in her incarceration described her as "severely defective," tests administered at Laurelton shortly after her arrival revealed that she was in the mild range of mental retardation with an IQ of roughly 60. Her IQ tests have remained fairly constant since. Her IQ is much higher than the overwhelming number of Laurelton residents, and she has always functioned at a higher level than most of the other Laurelton inmates. The 1956 test and all subsequent tests differ significantly from the "severely defective" diagnosis in the petition which resulted in her commitment.

The trial court found that soon after Clark was sent to Laurelton she expressed to the officials in charge of her custody her displeasure at being committed there against her will. The court found that she continued to protest her detention up to the time of the hearing, a period of over twenty-eight years. Despite her continuing protests, the court found, she never received a hearing regarding the propriety of either her initial commitment or her continued detention.

In 1962, when she had been held at Laurelton for six years, Clark reached the age of majority. Her commitment was not reviewed at that time. In 1966 the statute under which she had been committed was repealed. Her commitment was not reviewed under

the provisions of the new statute. In 1976, when Clark had been detained at Laurelton for twenty years, the commitment provisions of the 1966 statute were held to be unconstitutionally vague. See Goldy v. Beal, 492 F. Supp. 640 (M.D. Pa. 1976) (three-judge court). The Goldy court issued an order establishing new and stricter standards for involuntary commitments. Id. at 649-50. Clark's commitment was not reviewed under these court-ordered standards. Neither the Commonwealth defendants nor the County defendants have any established procedure for initiating judicial review of indefinite, involuntary commitment, either when the committed person requests such review, or when members of institutional

staffs conclude that the person no longer needs institutionalization. Both Clark and members of the institutional staff periodically requested judicial review of her commitment, but such review never occurred.

The professional staff at Laurelton, including Clark's treatment team, has agreed, at least since 1976, that Clark did not belong there, but should have been transferred to a community residential facility where she could learn to live independently. The stipulation of facts details the various steps that have been taken since 1976 by staff members to convince the Commonwealth defendants to place Clark in a less restrictive environment than Laurelton and to obtain a hearing on her commitment. All of those efforts were in vain. The trial court found,

> Although all the available professional opinion strongly favors a CLA for plaintiff, and has for the last nine years, plaintiff remains at Laurelton. The primary forces which have kept her there appear to be bureaucratic ineptitude and insufficient allocations of funds to community residence programs.

613 F. Supp. at 689.

Thus we are dealing with a plaintiff who was committed without notice or a hearing as the result of a petition containing an incorrect diagnosis, and who was retained against her will without a hearing for over twenty-eight years. Moreover we are dealing with a plaintiff who repeatedly requested that the persons in charge of her detention arrange for such a hearing, requests which were endorsed by the professional staff of the institution.

Finally, we are dealing with a plaintiff as to whom the professional staff of the institution recommended against the kind of treatment to which she was subjected. The trial court concluded that Clark's continued commitment at Laurelton violated procedural due process in that she never received an adequate hearing as to the propriety of her continued confinement. See 613 F. Supp. at 701. The trial court also concluded that Clark's substantive rights not to be unnecessarily institutionalized and to receive the minimally adequate training which was the only purpose for her commitment were violated. Id. at 705.

(1) Procedural Due Process

Clark contends that her initial commitment in 1956 violated due process. The trial court did not rely on

any process deficiency in the original commitment. See 613 F. Supp. at 698. The court concluded, however, and we agree, that due process required periodic reviews of her continuing need for institutionalization. Id. at 698-701. Periodic reviews are required because if the basis for a commitment ceases to exist, continued confinement violates the substantive liberty interest in freedom from unnecessary restraint. See O'Connor v. Donaldson, 422 U.S. 563, 574-75 (1975). As the Supreme Court has declared, "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." Jackson v. Indiana, 406 U.S. 715, 738 (1972). See also McNeil v. Director, Patuxent Institution, 407 U.S. 245, 249-50 (1972); Rennie v. Klein, 653 F.2d

836, 845 (3d Cir. 1981), vacated on other grounds, 458 U.S. 1119 (1982) on remand, 720 F.2d 266 (3d Cir. 1983). In Parham v. J.R., 442 U.S. 584, 607 (1979), the Court confirmed that the need for commitment must be reviewed periodically by a neutral factfinder.

The Commonwealth conceded in the district court that Clark was entitled to periodic review of her commitment. See 613 F. Supp. at 700. It contended, however, that the review process afforded to Clark within the walls of Laurelton satisfied due process. That process consisted of medical and psychological reviews. As the trial court found, however, since at least 1976 those reviews have consistently recommended that Clark be released from Laurelton, but the reviewers lacked the authority to implement their recommendations. The hearing required by the due

process clause is not a moot court exercise. The hearing tribunal must have the authority to afford relief. See Parham, 442 U.S. at 607.

Thus the trial court did not err in holding that Clark has been deprived of her liberty to be free from commitment without procedural due process. Over the course of more than twenty-eight years she was never afforded a hearing before any decisionmaker with authority to resolve her dispute with those who were confining her.

(2) Substantive Due Process

The trial court also held that Clark's confinement at Laurelton since at least 1976 in the face of unanimous professional opinion that she should be placed in a far less restrictive environment violated her substantive liberty

right to appropriate treatment. See 613 F.Supp. at 706. This holding is consistent with Youngberg v. Romeo, 457 U.S. 307, 321 (1982), which sets forth "the proper balance between the interests of the State and the rights of the involuntarily committed to reasonable conditions of safety and freedom from unreasonable restraints." Romeo requires that restraints be imposed only to the extent required by the judgment of professionals in charge of the involuntarily committed, and that the involuntarily committed receive minimally adequate training. Id. at 321-25. See also Thomas S. v Morrow, 781 F.2d 367 (4th Cir. 1986).

The stipulated facts establish that Clark was confined at Laurelton rather than released to a CLA, and was deprived of the training for community living which she could have received at

a CLA, despite professional judgment, unanimous since 1976, that she should be released from Laurelton and receive such training. Based on these findings, we agree with the district court and hold that her substantive liberty right to appropriate treatment under Romeo was violated.

IV.

This appeal is not moot. The eleventh amendment does not bar the relief which was ordered. The trial court's findings of fact amply support the legal conclusion that Clark's procedural and substantive due process rights were violated. The judgment appealed from will therefore be affirmed.

BECKER, Circuit Judge, concurring:

I agree with the majority that this case is not moot; hence, I join in part II of its opinion. I also agree that 29 U.S.C. § 794 (1984) does not afford Ms. Clark the relief she seeks. See Maj. Op. 13-14 n. 3 (29 U.S.C. § 794). I believe, however, that the majority's eleventh amendment analysis, Maj. Op. at 8-13, is incorrect, and that the eleventh amendment prevents Ms. Clark from receiving compensation for alleged violations of her constitutional rights occurring during her 29-year confinement at Laurelton center.[1] I would, nevertheless, grant Ms. Clark

---

[1] Because of my position on the eleventh amendment, I do not reach the merits of Ms. Clark's allegations of unconstitutional deprivations while at Laurelton, discussed by the majority in part III.B of its opinion.

the relief she seeks on a different ground: not as compensation for historical constitutional deprivations, but on account of her present constitutional right to treatment. I therefore concur in the judgment affirming the district court's order.

In part I of this concurrence, I shall explain my difference with the majority's eleventh amendment analysis. In part II, I shall identify Ms. Clark's right to treatment, describe its extent and limits, and explain its relevance in this case.

I.

The majority holds that Ms. Clark is entitled to relief now because of violations of her rights to procedural due process over the past 29 years, Maj. Op. at 17-19, and violations

of her substantive due process rights since 1976, Maj. Op. at 19-20. I believe that this analysis, which predicates relief on historical violations of Ms. Clark's constitutional rights, is barred by the eleventh amendment.

A. The Prospective-Retrospective Distinction in the Eleventh Amendment Jurisprudence

Although there is currently much scholarly debate about the origin and meaning of the eleventh amendment,[2] the Supreme Court has spoken clearly on the matter. Ever since Ex Parte Young, 209 U.S. 123 (1908), the rule has been that the eleventh amendment

---

[2]See, e.g., Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather

(FOOTNOTE CONTINUED)

does not permit federal courts to entertain suits against states in which the complainants seek compensation for historical violations of federal rights, but that the federal courts do have the

---

(FOOTNOTE CONTINUED)

than a Prohibition Against Jurisdiction, 35 Stan. L. Rev. 1033 (1983); Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum. L. Rev. 1889 (1983) C. Jacobs, The Eleventh Amendment and Sovereign Immunity (1972); Field, The Eleventh Amendment and Other Immunity Doctrines, 126 U. Pa. L. Rev. 515, 1203 (1978); Nowak, The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments, 75 Colum. L. Rev. 1413 (1975); Orth, The Interpretation of the Eleventh Amendment, 1798-1908: A Case Study of Judicial Power, 1983 U. Ill. L. Rev. 423; Shapiro, Wrong Turns: The Eleventh Amendment and the Pennhurst Case, 98 Harv. L. Rev. 61 (1984); Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 U. Colo. L. Rev. 1 (1972).

power to protect against states[3] continuing violations of federal rights. See, e.g., Green v. Mansour, ____ U.S. _____, 106 S. Ct. 423, 425-26 (1985); Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 102-03 (1984); Quern v. Jordan, 440 U.S. 332, 337 (1979); Edelman v. Jordan, 415 U.S. 651, 668 (1974). The Supreme Court has summarized its interpretation by saying that prospective relief is permitted whereas retrospective relief is not. See Quern v. Jordan, 440 U.S. at 337.

The distinction between prospective and retrospective relief "will not in many instances be that between

---

[3]Young insisted that the complainant sue the responsible state official rather than the state itself. We are unconcerned with that legal fiction here.

night and day," Edelman v. Jordan, 415 U.S. at 667, and the Court has thus enunciated a standard for determining whether relief is prospective or retrospective: it is retrospective, and hence barred by the eleventh amendment, if it is "measurable in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." Id. at 668. Application of this standard to the majority's solution in the instant case raises two questions: (1) is the relief sought -- placement in the community living arrangement (CLA) -- "measurable in terms of a monetary loss,"? and (2) does it (according to the majority's theory of the case)" result[] from a past breach of a legal duty" by the state?

The answer to both questions is "yes." I do not see Ms. Clark's loss of liberty, albeit tragic and outrageous, as different in kind from any of the other losses of liberty for which courts regularly recompense victims. In her demand for relief in this case, Ms. Clark seeks two million dollars to remedy the alleged violations of her substantive and procedural due process rights. Ms. Clark's desired remedy is thus "measurable in terms of a monetary loss." As to the second question, the majority clearly holds that Ms. Clark must be placed in the CLA because her due process rights have, for the past 29 years, been violated by the officials at Laurelton. See Maj. Op. at 10. There is therefore no doubt that the remedy is on account of a past breach of the state's legal duty to Ms. Clark. Because the

answer to both of these questions is in the affirmative, the majority's theory of the case is thus foreclosed by the eleventh amendment.

This conclusion comports with the Eighth Circuit's decision in Miener v. Missouri, 673 F.2d 969 (8th Cir.), cert. denied, 459 U.S. 909 (1982), in which the plaintiff, a sufferer of "serious learning disabilities and behaviorial disorders," id. at 972, requested compensatory educational services from the state defendants on the ground that she had been unconstitutionally denied a free education on account of here condition. The court held the plaintiff's suit barred by the eleventh amendment.

> An award of tuition reimbursement would clearly be barred as an award of damages for past breach of legal duty under this test. Riley v. Ambach, 508 F. Supp. 1222, 1248 (E.D.N.Y. 1980). We view the request for compensatory services as practically indistinguishable from a request for such reimbursement. Compensatory services, like the award of a money judgment, would be measurable against past educational deprivation. The expenditure of state monies to provide compensatory services would not, in other words, ensure "compliance in the future with a substantive federal question determination." Edelman v. Jordan, supra, 415 U.S. at 668, 94 S. Ct. at 1358 (emphasis added). We conclude that the eleventh amendment bars the award of such compensatory relief as appellant has requested. [Citations omitted].

Miener v. Missouri, 673 F.2d at 982.

See also Max M. v. Thompson, 566 F. Supp. 1330, 1336-37 (N.D. Ill. 1983)

(relying on Miener to deny claim for compensatory educational services).[4] The Ninth Circuit has recently adopted the Miener analysis in Alexopulos v. Riles, 784 F.2d 1408, 1412 (9th Cir. 1986). I believe that the Miener analysis is correct and fully applicable in this case.

B. The Meaning of Milliken II

The majority relies on Milliken v. Bradley, 433 U.S. 267 (1977)(Milliken II) in finding that the Eleventh Amendment is not a bar to Ms. Clark's suit. Because Milliken II is critical to the

---

[4]The district court later reversed itself on this point, explaining that it was constrained by dictum in Timms v. Metro. Sch. Dist. of Wabash County Ind., 722 F.2d 1310 (7th Cir. 1983), which had been decided after the first Max M. decision. See Max M. v. Thompson, 585 F. Supp. 317, 324 (N.D. Ill. 1984).

majority's position, and because the lessons to be drawn from it are not entirely clear, it is necessary to review that decision at some length.

In Milliken II, the district court found that the City of Detroit had practiced de jure segregation for many years. The district court therefore ordered a busing program and a remedial education program, funded by the state defendants, for those children who had attended the worst schools in the system. The Supreme Court upheld the plan against an eleventh amendment challenge on the grounds that the remedial plan was necessary to "'eliminate from the public schools all vestiges of state-imposed segregation.'" Milliken II, 43 U.S. at 290 (quoting Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971)). The Court went on:

> [B]y the nature of the antecedent violation, which on this record caused significant deficiencies in communication skills -- reading and speaking -- the victims of Detroit's de jure segregated system will continue to experience the effects of segregation until such future time as the remedial programs can help dissipate the continuing effects of past misconduct. Reading and speech deficiencies cannot be eliminated by judicial fiat; they will require time, patience, and skills of specially trained teachers. That the programs are also "compensatory" in nature does not change the fact that they are part of a plan that operates prospectively to bring about the delayed benefits of a unitary school system.

Milliken II, 433 U.S. at 290.

After reviewing Milliken II and quoting extensively from it, the majority asserts that Milliken II stands for the proposition that a federal court may

order states to fund programs to remedy historical violations of federal rights so long as the measures are necessary to undo those harmful effects of the historical violations that continue into the future. Maj. Op. at 13. The majority thus reads Milliken II as imposing what I will call a "continuing effects" exception on the traditional prosective-retrospective eleventh amendment dichotomy. The continuing effects exception works as follows: regardless of when the constitutional violation at issue occurs, the state is liable for any effects of the violation that are felt after the time of the institution of the suit. Applying the continuing effects exception to the instant case, the majority has no difficulty concluding that Ms. Clark's placement in a CLA was

intended to remedy the continuing effects of her improper detention at Laurelton, i.e., to prepare her to live in the general community with no, or minimal, assistance.[5]

Although a literal reading of Milliken II may support the continuing effects exception, I believe, for two reasons, that the exception is an unwarranted extension of the eleventh amendment jurisprudence. First, the exception would effectively obliterate

---

[5]Timms v. Metro. Sch. Dist. of Wabash County, Ind., 722 F.2d 1310, 1315-16 (7th Cir. 1983) raised, but did not unequivocally endorse or rely upon, an argument similar to the majority's in the case of a severely handicapped young woman seeking educational services. The Timms court decided the case on entirely separate grounds. See Id. at 1316.

the prospective-retrospective distinction: almost all wrongdoing has continuing effects, and a continuing effects exception would thus virtually emasculate the current, prevailing interpretation of the eleventh amendment. Virtually anyone who has a colorable argument of wrongdoing by the state will assert consequential damages; even if the claims eventually fail, the plaintiffs will have forced the state to defend itself in court -- an often expensive and risky undertaking. There is no indication in Milliken II itself that the Court intended to cut back so substantially on the long-standing prospective-retrospective distinction, and, in the several Supreme Court cases following Milliken II that involved the prosepctive-retrospective distinction, the distinction has been continually reasserted without extensive discussion of

Milliken II or any mention of a continuing effects exception, see, e.g., Green v. Mansour, supra; Pennhurst State Hospital v. Haldeman, supra; Quern v. Jordan, supra. Without some stronger indication from the Supreme Court, I cannot believe that Milliken II cuts so broad a swath as the majority perceives in the Eleventh Amendment jurisprudence.

Second, the exception is completely at odds with the reasoning underlying the prospective-retrospective distinction, which is that it is a greater affront to the sovereignty of the states to force them to pay for prior illegal acts (the illegality of which the states were presumably unaware) than to enjoin them from doing certain acts in the future. See Scott v. Plante, 691 F.2d 634, 637 (3d Cir. 1982)(Gibbons, J.)("Obviously the problem of hindsight

interference with decisions made by hard-pressed professional staff members of state mental institutions is a more serious one than that of assisting them in directing prospective injunctive relief against appropriate state officials."). The majority ignores this point, however for its continuing effects exception imposes potentially significant costs for states' prior acts. The incursion on state sovereignty is the same whether the state pays for continuing effects or past effects, for in either case the state is forced to pay for its prior acts.

The recent case of Green v. Mansour, supra, supports my position. In Green, recipients of federal funds (AFDC) sued the state official responsible for the administration of the funds, alleging violations of various federal statutes.

Before the suit was decided, Congress amended the relevant federal statutes, and it was undisputed that the program was properly run from then on. Plaintiffs nevertheless sought relief in the form of (1) a declaratory judgment stating that the official's conduct had violated federal law and (2) a notice sent by the state to all members of the class advising them that there were state administrative procedures available to determine whether they were eligible for past benefits.

The Supreme Court held that the requested relief was barred by the eleventh amendment. The Court began its analysis by restating and strongly reaffirming the prospective-retrospective distinction. Green v. Mansour, 106 S.Ct. at 426. Then, the Court made clear

that as a consequence of the distinction the eleventh amendment barred all but the prevention of ongoing violations of federal laws: "Because 'notice relief' is not the type of remedy designed to prevent ongoing violations of federal law, the Eleventh Amendment limitation on the Art. III power of federal courts prevents them from ordering it as an independent form of relief." Id. at 427. The Court's reliance on such well-entrenched eleventh amendment doctrine in a case where no more was sought by way of arguably retrospective relief than an order that the state provide notice is suggestive of the weakness of the majority's position here, for, as explained above, the majority's position severely limits and undermines the conceptual underpinnings of the doctrine.

·In addition, what the Green Court did not say may be as important as what it did. Cf. A. Doyle. The Silver Blaze (dog that did not bark provides key to case), in The Complete Sherlock Holmes (1938). The Green dissent criticized the Court's reliance on the prospective-retrospective distinction in the eleventh amendment context, and in so doing adopted a position similar to the majority's in this case. The Green dissent stated that "[t]he distinction is hardly so neat as the majority implies," 106 S.Ct. at 432 n. (Marshall J., dissenting), and then supported its charge be quoting portions of Milliken II relied upon by the majority in this case. Compare id. with Maj. Op. at 11-12. The Green dissent may thus fairly be read as at least exploring a continuing effects exception derived

from Milliken II. The fact that this line of argument was noted by the Green dissent and not answered by the majority implies that the majority was aware of it, but unpersuaded.

We are left, then, with an anomaly in the Supreme Court's eleventh amendment jurisprudence. The majority deals with the anomaly by ignoring it. The majority simply focuses on Milliken II and does not consider it in context with the Supreme Court's other eleventh amendment cases. By refusing even to acknowledge the tension between Milliken II and those other cases, and by blindly following Milliken II, the majority reaches a holding that effectively overrules, or at least severely limits, the rest of the cases.

As I have indicated above, I think that this takes Milliken II much too far. When one decision is so completely at odds with a whole body of law as Milliken II is with the rest of the eleventh amendment cases, the most appropriate reading is to limit that case to its facts perhaps more severely than we would otherwise be inclined to do. This interpretive rule is derived from our role as inferior judges in the federal system: we cannot overturn the decisions of the Supreme Court, but must always attempt to harmonize them. When the harmony is on the whole strong and clear, as I believe it is in the eleventh amendment context, we should make sure that any discordant notes are muted.

The limitations must be principled, not arbitrary: it must draw its essence from the historical context in which the case arose. In the case of Milliken II, the historical context is rich and significant. Milliken II was part of a long line of Supreme Court cases dealing with racial desegregation, and long before Milliken II the Supreme Court had made clear that racial segregation was a unique blight on our nation that would be combatted by extraordinary measures. See e.g. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); Brown v. Bd. of Ed. of Topeka, 347 U.S. 483 (1954). The pronouncements and decisions that the Court made during the fight against school segregation should not automatically be applied to other situations that may not share the same historical factors that went into

the Court's desegregation decisions. The Court was aware when it was deciding the school desegregation cases that the history of Blacks in this country was unique, and subsequent courts cannot ignore that fact in interpreting those cases.

In light of Milliken II's variance with the rest of the eleventh amendment jurisprudence, and in light of the striking historical factors underlying Milliken II, I believe that Milliken II should be read as adopting a continuing effects exception applicable to racial desegregation cases only, or, even more narrowly, school desegregation cases. I admit that no such limitation is to be found on the face of Milliken II, but I believe that my reading is faithful to the spirit of the opinion

and the context in which it was written. This is not to say, of course, that every judicial decision concerning racial matters cannot have precedential effect beyond the area of race, but merely, as stated above, that when one decision is completely at odds with a whole body of law, as Milliken II is with the rest of the eleventh amendment cases, a limited but principled reading of the case is to be preferred.

Given this reading of Milliken II, it is clear that the continuing effects exception does not apply to this case. The main body of the eleventh amendment jurisprudence controls, and, for the reasons stated above, mandates that Ms. Clark cannot predicate her claim for relief on the historical mistreatment that she suffered while at Laurelton.

II.

Because I believe that the eleventh amendment bars Ms. Clark from receiving the injunctive relief she seeks as a remedy for any historical violations of her due process rights, if Ms. Clark is entitled to such relief, it must be because she has a present constitutional entitlement to it, independent of any mistreatment she suffered in the past. I believe that the existence vel non of such a constitutional entitlement, and the extent of such an entitlement if it exists, are the central questions on this appeal.

A. Historical Foundation for the Right to Habilitation

The right to habilitation[6] of

---

[6]Technically, one refers to "training" or "habilitation" of the mentally retarded, and "treatment" of

(FOOTNOTE CONTINUED ON NEXT PAGE)

the involuntarily[7] civilly committed

(FOOTNOTE CONTINUED)

the mentally ill. See Youngberg v. Romeo, 457 U.S. 307, 309 n. 1 (1982); Note, Beyond Youngberg: Protecting the Fundamental Rights of the Mentally Retarded, 51 Fordham L. Rev. 1064, 1074 n.53 (1983). Although the terms are frequently used interchangeably, see, eg., Youngberg, I respect the distinction and will limit my discussion here to the right to habilitation.

[7]Ms. Clark was involuntarily committed, and I therefore limit this discussion to the right of the involuntarily committed. At least one court has stated that whether a person was voluntarily or involuntarily committed may influence his or her right to treatment. Doe v. Public Health Trust of Dade County, 696 F.2d 901, 903 (11th Cir. 1983)(per curiam). Others, however, noting the frequent significant mental deficiencies of the voluntarily civilly committed, have questioned whether their consent to confinement was informed, and therefore whether there is any basis for treating them differently from those involuntarily civilly committed. See Association for Retarded Citizens of North Dakota v. Olson, 561 F. Supp. 473, 484 (D.N.D. 1982); Note, The Constitutional Right to Treatment in Light of Youngberg v. Romeo, 72 Geo. L.J. 1785, 1791 (1984).

has been the subject of numerous opinions and scholarly articles.[8] Although

---

(FOOTNOTE CONTINUED)

[8]See, e.g., Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239 (2d Cir. 1984); Phillips v. Thompson, 715 F.2d 365 (7th Cir. 1983); Doe v. Public Health Trust of Dade County, 696 F.2d 901 (11th Cir. 1983)(per curiam); Scott' v. Plante, 691 F.2d 634 (3d Cir. 1982); Donaldson v. O Connor, 493 F.2d 507 (5th Cir. 1974), vacated and remanded, 422 U.S. 563 (1975); Association of Retarded Citizens of North Dakota v. Olson, 561 F. Supp. 473 (D.N.D. 1982); Evans v. Washington, 459 F. Supp. 483 (D.D.C. 1978); Gary v. State of Louisiana, 437 F. Supp. 1209 (E.D.La. 1976); Welsch v. Likins, 373 F. Supp. 487 (D.Minn. 1974); Stachulak v. Coughlin, 364 F. Supp 686, 687 (S.D. Ill. 1973); Davy v. Sullivan, 354 F. Supp. 1320, 1324-30 (M.D. Ala. 1973)(per curiam); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), aff'd, remanded, and reversed in part sub. nom. Wyatt v. Aderhalt, 503 F.2d 1305 (5th Cir. 1974); Slovenko, The Past and Present of the Right to Treatment: A Slogan Gone Astray, 9 J. Psych. & Law 263 (1981); Spece, Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories, 20 Ariz. L. Rev. 1 (1978); Mason & Menolascino, The

(FOOTNOTE CONTINUED ON NEXT PAGE)

the cases and articles have not coalesced into a unanimous position, a consensus has developed among the lower courts that the involuntarily civilly committed do have a right to habilitation. There are two principal theories concerning that right, the quid pro quo theory and the parents partrice theory.[9] I shall describe them both here.

(FOOTNOTE CONTINUED)

Right to Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface, 10 Creighton L. Rev. 124 (1976); Birnbaum, The Right to Treatment, 46 A.B.A.J. 499 (1960); Note, 72 Geo. L.J. 1785; Note, 51 Fordham L. Rev. 1064; Note, Developments in the Law - Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190 (1974). See generally 31 Stan. L. Rev. 541-829 (1979) (symposium on mental retardation and the law).

[9]There are two other theories of the right to habilitation that I do not consider here. First, the least restrictive alternative theory, relied upon by the court in Rone v. Fireman, 473

(FOOTNOTE CONTINUED ON NEXT PAGE)

(FOOTNOTED CONTINUED)

F. Supp. 92, 125 (N.D. Ohio 1979) and endorsed in Spece, Justifying Invigorated Scrutiny and the Least Restrictive Alternative As a Superior Form of Intermediate Review: Civil Commitment and the Right to Treatment As a Case Study, 21 Ariz. L. Rev. 1049 (1979), requires treatment on the grounds that the involuntarily civilly committed have a right to live in the least restrictive setting possible and treatment is necessary to effectuate that goal. This argument has been effectively foreclosed by this court's decision in Rennie v. Klein, 720 F.2d 266 (1983)(en banc) in which six judges endorsed the view that Youngberg v. Romeo, 457 U.S. 307 (1982), made least alternative analysis inapplicable to the involuntarily civilly committed. I discuss Youngberg briefly infra at 23.

Second, the incarceration due to status theory holds that, unless they are afforded treatment, the involuntarily civilly committed would be indistinguishable from criminals incarcerated for no crime; mental illness or impairment would be effectively status crimes, which violate the eighth amendment, see Robinson v. California, 370 U.S. 660, 666-67 (1962). See Welsch v. Likins, 373 F. Supp. at 496 (endorsing this theory); Martarella v. Kelly, 349

(FOOTNOTE CONTINUED)

1. The Quid Pro Quo Theory --

At the outset, it is important to distinguish the two powers pursuant to which a state may involuntarily civilly commit a person. The state may commit someone to involuntary civil confinement using its police power or its power of parens patriae. See Herman, Barriers to Providing Effective Treatment: A Critique of Revisions in Procedural, Sub-

---

F. Supp. 575, 599 (S.D.N.Y. 1972) (same). The two problems with this theory are (1) it is doubtful that the eighth amendment has any force outside of the criminal context, see Ingraham v. Wright, 430 U.S. 651, 664-71 (1977); Youngberg v. Romeo, 644 F.2d 147, 156 (3d Cir. 1980)(en banc), vacated and remanded, 457 U.S. 307 (1982); and (2) even if the eighth amendment does extend beyond the criminal context, it is doubtful that failure to treat is "punishment" proscribed by that amendment. See Garvey, Freedom and Choice in Constitutional Law, 94 Harv. L. Rev. 1756, 1788-89 n.140 (1981).

stantive, and Dispositional Criteria in Involuntary Civil Commitment, 39 Vand. L. Rev. 83, 85 (1986). Under the police power, the state may confine people who are dangerous to others. The parens patriae power, by contrast, allows the state to confine people who, although not dangerous to others, are in need of care or treatment. The quid pro quo theory applies to any involuntarily civilly committed person; the parens patriae theory applies, as its name would suggest, only when the state involuntarily civilly commits someone pursuant to its parens patriae power.

The premise of the quid pro quo theory is that any involuntary commitment, civil or criminal, entails a "massive curtailment of liberty." Humphrey v. Cady, 405 U.S. 504, 509 (1972). Although the infringement on

liberty is the same in criminal and civil commitment, the circumstances surrounding the two situations are quite different. When people are incarcerated for criminal acts, the curtailment of liberty is not unconstitutional because (1) the curtailment is attended by extensive procedural safegaurds mandated by the Constitution, and (2) the curtailment is for a specific offense for which the incarcerated person was responsible; there is thus some sense in which he or she deserves, or has consented to, the curtailment of his or her liberty.

By contrast, those who are civilly committed have usually not been protected by the panoply of procedural safeguards found in the criminal system,

and they have not committed any acts that could justify their confinement. Civil involuntary commitment is therefore constitutionally problematic, and to justify it the state must give the civilly committed persons something in exchange for their loss of liberty. As explained by Judge Alvin B. Rubin in Gary W. v. State of Louisiana, 437 F. Supp. 1209, 1216 (E.D. La. 1976), aff'd on other grounds, 601 F.2d 240 (5th Cir. 1979):

> Long-term detention of an individual is ordinarily a denial of due process except when he has been proved, in a proceeding subject to the rigorous constitutional limitations of the due process clause and the Bill of Rights, to have committed a specific act defined as an offense against the state, and for which

> incarceration is permitted for a fixed term only. If an individual, adult or child, healthy or ill, is confined by the government for some reasons other than his commission of a criminal offense, the state must provide some benefit to the individual in return for the deprivation of his liberty.

(emphasis added).

According to the quid pro quo theory, due process dictates that the benefit to which the involuntarily civilly committed are entitled is habilitation to enable them to leave their commitment. Just as one confined for civil contempt of court must have the keys to the jailhouse in his pocket," so those involuntarily civilly committed must be provided with the means to end their commitment, otherwise civil commitment would be equivalent to placement in "a penitentiary where one

could be held indefinitely for no convicted offense." Ragsdale v. Overholser, 281 F.2d 943, 950 (D.C. Cir. 1960)(Fahy, J., concurring). Habilitation is the constitutionally required quid pro quo for civil confinement, hence the name of the theory. See Note, 72 Geo.L.J. at 1790-93 (identifying and discussing the quid pro quo theory of right to treatment).[10]

---

[10] See also Donaldson v. O'Connor, 493 F.2d at 522:

> [W]hen the . . . limitations on the government's power to detain [that constrain the government in the criminal context] are absent, there must be a quid pro quo extended by the government to justify confinement.

(FOOTNOTE CONTINUED ON NEXT PAGE)

2. The Parens Patriae Theory

-- The derivation of the right under the parens patriae theory is quite straight-for-ward. Simply put, the argument is that it violates the tenets of fundamental fairness embodied in the due process clause for the state to deprive a person of her or his liberty for the stated purpose of training that person, and then to fail even to attempt to give training. As eloquently explained by Judge Frank M. Johnson, Jr.: "To deprive any citizen of his or her liberty upon the altruistic theory

---

And the quid pro quo most commonly recognized is the provision of rehabilitative treatment, or, where rehabilitation is impossible, minimally adequate habilitation and care, beyond the subsistence level custodial care that would be provided in a penitentiary.

(footnotes omitted).

that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process." Wyatt v. Stickney, 325 F. Supp. at 785.

Judge John Minor Wisdom made the same point in the first decision by a Court of Appeals to adopt the parens patriae theory:

> [Where] the rationale for confinement is the "parens patriae" rationale that the patient is in need of treatment, the due process clause requires that minimally adequate treatment be in fact provided. This in turn requires that, at least for the nondangerous patient, constitutionally minimum standards of treatment be established and enforced.

Donaldson v. O'Connor, 493 F.2d at 521. See also Woe v. Cuomo, 729 F.2d 96, 105

(2d Cir.)("If the justification for commitment rests, even in part, upon the need for care and treatment, . . . then a State which commits must also treat."), cert. denied, ___ U.S. ____, 105 S.Ct. 339 (1984); Johnson v. Solomon, 484 F. Supp. 278, 300 (D.Md., 1979)("The right to treatment, then, is but the corresponding obligation of the state in light of its right to exercise its parens patriae power over its citizens.") (footnote omitted); Welsch v. Likins, 373 F. Supp. at 499 ("civil commitment for reasons of mental retardation [must] be accompanied by minimally adequate treatment designed to give each committed person 'a realistic opportunity to be cured or to improve his or her mental condition' Wyatt v. Stickney, supra, 325 F. Supp. at 784.").

Although the Supreme Court has not had occasion specifically to address this theory of a state's obligations to those it commits pursuant to its parens patriae power, in Jackson v. Indiana, 406 U 715, 738 (1972), the Court enunciated a rule that gives strong support to the theory. In striking down a state law that permitted the state to confined indefinitely a mentally deficient deaf mute adjudged incompetent to stand trial, the Court said: "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." This logic supports the parens patriae theory, for, as Judge Wisdom explained, "[i]f the 'purpose' of commitment is treatment, and treatment is not provided, then the

'nature' of the commitment bears no reasonable relation' to its 'purpose,' and the constitutional rule of Jackson is violated." Donaldson, 493 F.2d at 521. See also Youngberg v. Romeo, 457 U.S. 307, 325-26 (1982)(Blackmun, J., concurring).

3. Ms. Clark's Right to Habilitation -- Ms. Clark was involuntarily civilly committed, and the quid pro quo theory therefore applies to her case. In addition, as there is no indication in the record that Ms. Clark was, at the time of her initial confinement or at any time thereafter, a threat or danger to anyone in society, the state must have been acting at all times under its parens patriae authority in detaining her. The parens patriae theory is therefore also applicable. I thus conclude that, at all times when she was

or will be[11] involuntarily committed, Ms. Clark had and will continue to have a constitutional right to habilitation under both the quid pro quo and the parens patriae theories.

B. The Extent of the Right to Habilitation

Like all constitutional rights, the right to habilitation of involuntarily civilly committed persons is not absolute. The courts must therefore determine how strong a right it is. I shall not propose a comprehensive answer

---

[11]As I explain below, even though she is currently at the CLA, Ms. Clark is still involuntarily committed. Because it is the mere fact of involuntary civil commitment that creates the right to treatment, Ms. Clark has a right to habilitation whether she is at Laurelton or at a CLA.

to that question here, for I believe that the answer will come about only as a result of case-by-case analysis and development. Rather, I shall propose and defend a limited right to treatment, based on Justice Blackmun's concurring opinion in Youngberg v. Romeo, 457 U.S. 307, 325 (1982), that is sufficient to decide the case at hand.

1. Justice Blackmun's Concurrence: The Non- Deterioration Principle -- Before considering Justice Blackmun's concurring opinion in Youngberg v. Romeo, supra, it would be best to summarize the majority's opinion in that case. In Youngberg, the Supreme Court held that a severely retarded, involuntarily civilly committed man had a due process right to such training or habilitation as was required "in light of [his] liberty interests in safety and

freedom from unreasonable restraints." 457 U.S. at 322. This is "such training as an appropriate professional would consider reasonable to ensure [the patient's] safety and to facilitate his ability to function free from bodily restraints." Id. at 324. Youngberg dealt exclusively with training related to physical restraints; the Court expressly stated that it was neither considering nor ruling on any broader right to habilitation. Id. at 316 & n. 19; id. at 318 & n.23.

Justice Blackmun, in a concurrence joined by Justices Brennan and O'Connor, agreed that no broader right to habilitation was before the Court. Id. at 326-27 (Blackmun, Jr., concurring). He suggested, however, that an involuntarily civilly committed person might

have a due process right to such training as is necessary to preserve his or her self-care skills, i.e., to prevent them from deteriorating during the person's commitment.

> If a person could demonstrate that he entered a state institution with minimal self-care skills, but lost those skills after commitment because of the State's unreasonable refusal to provide him training, then, it seems to me, he has alleged a loss of liberty quite distinct from -- and as serious as -- the loss of safety and freedom from unreasonable restraints. For many mentally retarded people, the difference between the capacity to do things for themselves within an institution and total dependence on the institution for all of their needs is as much liberty as they ever will know.

Id. at 327 (Blackmun, J., concurring). I shall refer to this as the non-deterioration principle. Although Justice Blackmun merely suggested the non-deterioration principle and did not definitively endorse it, id. at 329 (Blackmun, J., concurring), other courts have endorsed the principle. See Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239, 1250 (2d Cir. 1984); Lelsz v. Kavanaugh, (N.D. Tex. March 4, 1986)(No. 3-85-2462-H Civ.); Association for Retarded Citizens of North Dakota v. Olsen, 561 F. Supp. at 487.

I, too, would endorse the non-deterioration principle. Liberty is more than merely the absence of physical

confinement; as the Supreme Court's privacy cases make clear, the right of liberty is a right to personal autonomy, see, e.g., Carey v. Population Servs. Int'l, 431 U.S. 678, 693 n.15 (1977); Whalen v. Roe, 429 U.S. 589, 599-600 & n.26 (1977); Roe v. Wade, 410 U.S. 113, 153 (1973). See also Garvey, Freedom and Choice in Constitutional Law, 94 Harv. L. Rev. 1756, 1760 (1981). The mentally disabled cannot have meaningful autonomy, and hence meaningful liberty, without basic skills; therefore, for the state to allow disabled persons' skills to deteriorate is as sure a denial of their liberty as is their confinement to an institution. It is indeed a sad fact that for many mentally disabled people self-care skills are "as much liberty as

they ever will know." Youngberg v. Romeo, 457 U.S. at 327 (Blackmun, J., concurring). The right to habilitation would be a nullity if that right did not extend even to prevent the deterioration of people's skills.

2. The Modified Non-Deterioration Principle -- I am concerned by a potential limitation raised by one aspect of the non-deterioration principle, and therefore I wish to set forth my understanding of the contours of the principle. Consider a patient who is committed at an early age, who remains in confinement for a significant period of time, but whose self-care skills might have improved even if she had never been committed. (This example is not merely hypothetical; as will be seen below, it pertains to the case before us.) Under a

restrictive interpretation of the non-deterioration principle, the state would be bound merely to assure that that person's skills did not deteriorate below the level at which they were when she or he entered the state institution. It seems to me, however, that the state should be required to provide such a person with at least such training as would match the improvement that she or he would have experienced if never committed. The reasoning behind this position is analogous to the reasoning supporting the non-deterioration principle: by committing people and preventing them from developing self-care skills, the state is effectively depriving them of the opportunity to develop and exercise their autonomy. This is a deprivation of their due process right to liberty.

I thus endorse a modified non-deterioration principle: involuntarily civilly committed persons have a right to treatment sufficient to develop their self-care skills to at least the level at which they would be if the persons had not been institutionalized.

3. Application of the Modified Non-Deterioration Principle -- As the majority notes, the district court found that "[b]ut for the then well-intentioned intervention of the state, Ms. Clark would most likely have lived an average life," 613 F. Supp. at 707 (quoted in Maj. Op. at 8-9). That finding was not clearly erroneous. The majority also points to the stipulation that according to the very experts at the Laurelton Center, the barriers to Ms. Clark's entering society without supervision arose primarily on account of her long institutionalization. Maj. Op. at 9.

The conclusion to be drawn from these observations is that if Ms. Clark had not been institutionalized, she would have developed into a functioning member of society who would need no, or minimal, supervision. Because her institutionalization has led to her debilitation, the modified non-deterioration principle requires the state to provide Ms. Clark, who remains involuntarily committed, albeit to a CLA, see infra, with training and treatment sufficient to put her in the position in which she would have been had she never been institutionalized. Because it appears from the numerous, uncontradicted doctors' reports in the record that placement in a CLA is the only or best way for Ms. Clark to receive the training that she is due, I believe that she has a right to placement in the CLA, until she had acquired the skills she

would have had she never been institutionalized.[12]

---

[12]My conclusion is at odds with that of the Seventh Circuit in Phillips v. Thompson, 715 F.2d 365, 367 (1983), which held that involuntarily civilly committed mentally disabled people had no due process right to live in a community program, like the CLA at issue here. (Although only voluntarily civilly committed persons were involved in Phillips, the court analyzed the case as if they had the same rights as involuntarily committed persons.) The Phillips court based its conclusion on an incorrect reading of Youngberg v. Romeo according to which Youngberg meant that involuntarily committed people had a right to treatment only insofar as the treatment was necessary to support their freedom from physical constraints. See 715 F.2d 367-68. As I pointed out, supra at ___, this position is simply incorrect; Youngberg expressly stated that it was not concerned with the question of a general due process right to treatment. 457 U.S. at 316 & n.19; id. at 318 & n.23. Also worthy of note is Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239 (2d Cir. 1984), which adopted Justice Blackmun's nondeterioration principle, see supra at ___, but vacated that part

(FOOTNOTE CONTINUED ON NEXT PAGE)

Because this is such a complicated area of law, I wish to make clear three questions I am not addressing in this opinion. First, I do not decide whether the right to habilitation survives the release of the involuntarily committed. This issue is irrelevant to Ms. Clark, for although the CLA is far less restrictive than Laurelton Center, it

---

(FOOTNOTE CONTINUED)

of the district court's order requiring the community placement of certain patients. 737 F.2d at 1251. That portion of Society for Good Will is distinguishable from this case, for the Society for Good Will court expressly found that "[institution] residents are not unduly restrained by residing at [the institution]." Id. at 1251. Here, by contrast, the uncontradicted evidence is that Ms. Clark cannot reach the level she would have reached had she never been institutionalized -- that is, she cannot enjoy her full right to liberty -- without placement in the CLA. That crucial difference distinguishes Society for Good Will from this case. To the extent that Society for Good Will is not distinguishable, I think it wrongly decided.

appears from the record that Ms. Clark is still involuntarily committed even while at the CLA. The district court's order compelling the state to fund Ms. Clark's CLA placement made no change in her status as an involuntarily civilly committed person. The record reveals that Ms. Clark cannot leave the CLA permanently without permission, and that she is not free to enjoy all lawful activities. Ms. Clark has therefore not been released. It is not clear, however, whether persons have rights to habilitation once they are released. The reasons they might not is seen from the justification for the right to habilitation: because the right to habilitation is derived from the liberty infringement caused by involuntary confinement, once a person is no longer in the state's custody, he or she may

have no more right to habilitation. Furthermore, the eleventh amendment would prevent him or her from suing in federal court to vindicate the right that he or she had before release, for that would be a suit for vindication of an historical violation of rights. See supra part I.

Despite its apparent logic, this position may work a very unfair result. Were it to prevail, the state could release someone to whom it owed a grave obligation, and then hide behind its eleventh amendment shield to avoid that obligation. One solution may be to hold that although the right to habilitation derives from the involuntarily committed person's deprivation of liberty, it survives the termination of that deprivation. Thus, for example, one might argue that one has the right

conferred by the modified non-deterioration principle until that right is satisfied, regardless of where the right-holder may be. I need not consider here the ultimate success of such an argument.[13]

Second, in enunciating the modified non-deterioration principle, I leave open the question whether the involuntarily civilly committed have a right to even greater habilitation than the modified non-deterioration principle would allow. It might be argued, for example, under the theories discussed

---

[13]I also leave open whether the continuing right would obtain pursuant to both the parens patriae and quid pro quo theories. Whereas the continuing right to habilitation is clearly compatible with the parens patriae theory, it would appear that by its very nature the quid pro quo theory supports a right to habilitation only during the time of actual civil involuntary commitment.

here or some other theory of habilitation, that the involuntarily civilly committed have a right to as much habilitation as their capacity will allow. Alternatively, one might argue that all involuntarily civilly committed persons are entitled to treatment up to an absolute level, regardless of their status upon entrance to the institution. Because Ms. Clark was only slightly retarded, I need not consider these questions in her case.

Third, and integrally related to the second question, is the question of cost. How much should the state be forced to pay on behalf of each person's habilitation? Must the state pay exorbitant costs, even if they are greatly in excess of the value of any improvement? Such a requirement might create a significant burden on state treasuries.

Once again, I need not address this issue, for one of the perversities of this case is the district court's non-clearly erroneous finding that it would have cost the state less to put Ms. Clark in a CLA than to keep her at Laurelton.

III.

I believe that that eleventh amendment prevents Ms. Clark from receiving compensation for any alleged violations of her constitutional rights during her confinement at Laurelton Center, and that the majority therefore erred in finding to the contrary. I further believe that the due process clause affords Ms. Clark a right, for as long as she is involuntarily committed, to at least as much treatment as is necessary to assure that her self-care

skills develop as well as they would. have if she had never been committed. This right mandates her placement in the CLA. I therefore concur in the judgment of the court.

A True Copy:

Teste:

Clerk of the United States
Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CAROLYN CLARK	:	CIVIL ACTION
vs.	:	
WALTER COHEN, et al.	:	No. 84-3383

OPINION

HUYETT, J. JUNE 20, 1985

Presently pending before me is plaintiff's motion for equitable relief. For the reasons set forth in the following findings of fact, discussion, and conclusions of law, this motion will be granted.

I. FINDINGS OF FACT

Because the parties have entered into a very comprehensive stipulation of the facts of this tragic case, I will provide only a brief summary of the relevant fact. The following narrative together with the stipulation constitute my findings of facts.

Plaintiff is forty-four years old. She has spent her entire adult life at Laurelton Center ("Laurelton"), a state institution for the mentally retarded, after she was committed there in 1956 at the age of fifteen. At the time of her commitment plaintiff had been taken from the custody of her family. There are suggestions in the record and among the documents from her

file at Laurelton that plaintiff's family life prior to her commitment was tempestous and disruptive to her development. A petition for plaintiff's commitment pursuant to § 326 of the Mental Health Act of 1951, as amended, 50 P.S. § 1071 et seq., repealed by Mental Health and Retardation Act of 1966, 1966 Pa. Laws 96 (codified at 50 Pa. Stat. Ann. §§ 4101-4704 (Purdon 1969)), was filed on November 8, 1956 and approved by the court the next day. Plaintiff did not have a hearing in connection with her commitment nor did she receive notice of the petition.

On November 11, 1956 plaintiff was transported to Laurelton, a residential institution located in Union County, Pennsylvania which houses approximately 350 mentally retarded persons. It is at least four hours from Philadelphia. At

the time of her commitment, plaintiff was a resident of Philadelphia and still has family there. She has not seen them for approximately six years.

Although plaintiff was described as "severely defective" in the commitment petition in 1956, tests administered to her soon after her admittance at Laurelton revealed that she is in the mild range of mental retardation with an IQ of roughly 60. Her IQ tests have remained fairly constant since that time. Her IQ is much higher than the vast number of Laurelton residents and plaintiff functions at a much higher level than most of her companions at Laurelton.

Soon after she was sent to Laurelton, plaintiff expressed her displeasure with being committed there

against her will. She has continued to protest her detention there up to the present time. Despite these protests, plaintiff never received a hearing regarding the propriety of either her initial commitment or her continued residence at Laurelton. Her efforts, however, to obtain a hearing have been unstinting at least since 1981.

Durind her almost thirty years at Laurelton, the law regarding the treatment and rights of mentally ill and mentally retarded people has changed dramatically. The statute under which plaintiff was originally committed was repealed and replaced in 1966. Plaintiff's commitment was then deemed by the Commonwealth to be equivalent to one under the new statute. In 1976, a three judge panel declared § 406 of the 1966

Act--the section dealing with involuntary commitments--unconstitutional. In spite of these events and in spite of the fact that plaintiff reached maturity in 1962, plaintiff never received a hearing. It appears from the testimony of James Pelter that the Commonwealth's Department of Public Welfare ("DPW") has no formal procedure under which persons committed indefinitely are given hearings to review their commitments. An average hearing pursuant to § 406 of the 1966 Act held in Union County costs approximately $132.

In April, 1984, Elizabeth Keister a Laurelton employee, prepared a petition requesting authority to detain plaintiff pursuant to § 406 of the 1966 Act. In that petition, Keister stated:

"Carolyn was admitted to Laurelton Center on November 15, 1956, under section 326 of the MH/MR Act of 1951, as amended in 1954. This commitment has never been reviewed in Ms. Clark's 28 years at Laurelton Center. Ms. Clark is mildly retarded, possesses all self-care skill and basic academic skills. Ms. Clark is requesting placement in a community residential facility or a review of her commitment. The least restrictive environment for Ms. Clark would be a structured community living arrangement and day program. Due to her long institutionalization she could not live independently at this time." This petition was never filed.

Although plaintiff has remained at Laurelton since her commitment in 1956, the staff at that facility, including plaintiff's treatment team, has

agreed, at least since 1976, that she should be placed in a community living arrangement ("CLA"). All of the professionals who testified at the hearing on this matter voiced this same opinion. The stipulation details the various steps that have been taken in order to convince those in power to place plaintiff in a CLA. All of these efforts were to no avail.

A CLA consists in most general terms of a small residential group composed of mentally retarded people who function at similar levels. These individuals live in a house within the community and receive intensive supervision and training in those behaviors and skills necessary to function independently within the community. A CLA is designed to allow a mentally retarded person to live in a setting which is as

close to a "normal" one as possible. They are also designed to allow for more community interaction and interaction with nonretarded persons than is an isolated institution such as Laurelton. Plaintiff has continually sought placement in some form of CLA since at least 1976. She continues to want such a placement very much.

James McFall testified on behalf of plaintiff at the May 28, 1985 hearing. McFall is qualified as an expert in the field of psychology. Although he does not possess a doctoral degree in that field, he has completed all of his degree requirements except for his dissertation. In addition, he has extensive work experience in the treatment of mentally retarded persons.

In his opinion, there are no contradicitions to a placement in a CLA for plaintiff. He testified that in his expe-rience, plaintiff functions at a higher level than many of those currently placed in CLAs in Philadelphia. He described plaintiff as at "the highest functioning levels of any of my clients."

Dr. Paul Spangler also testified on behalf of plaintiff. He holds a doctoral degree in psychology and has extensive experience in the treatment of the mentally retarded. I find him to be qualified as an expert in the field of psychology. Spangler opined that plaintiff should be placed into a CLA as soon as possible. He noted that many people who function at a level below plaintiff's are already either in a structured CLA or in some other form of community residence. He stated that in

1985 it was unusual to see someone like plaintiff in a large institution like Laurelton.

Spangler also described a CLA program that has been developed by defendant County of Philadelphia.[1] This program, known as a Teaching Family Home, would allow plaintiff to share a home with a small number of other mentally retarded people and a husband and wife team of trained psychologists. This

---

[1]Before the hearing was held on this matter, plaintiff reached a settlement with those defendants employed by the County of Philadelphia and the private defendants concerning her motion for preliminary relief. Under this settlement, the County has planned and developed a CLA placement for plaintiff which could be implemented within 120 days of the date of an order from this court if the Commonwealth provides funds.

team would be augmented by one or two other staff members from time to time, thus bringing the staff to patient ratio to approximately one to one. This is a much higher ratio than is available at Laurelton. Spangler stated that in his opinion, plaintiff would spend approximately two years in such a placement, then two years at a minimal supervision CLA, and then live independently with some backup support. The costs of this program would be $56,000 per year for the Teaching Family Home, $20,000 to $25,000 per year for the minimal supervision CLA, and approximately $4,000 per year for the necessary backup support after that. By contrast, it costs the Commonwealth approximately $40,000 to $48,000 per year to maintain plaintiff at Laurelton.

Spangler and McFall also testified that the opportunities for growth and training at a CLA far exceeded those available at Laurelton. Although some aspects of these opinions were disputed by witnesses for the defendants, I find that Spangler and McFall were credible expert witnesses and I credit their opinions regarding the relative merits of life at a CLA and Laurelton. It is uncontroverted that certain aspects of CLA life simply cannot be duplicated at Laurelton. For example, because of its remote setting, the degree of community involvement at Laurelton will never be as great as that in a CLA. Neither will plaintiff be able to practice the food preparation she would be able to practice in a CLA.

Indeed, many attributes of a CLA make it far superior in every way to institutionalization for someone like plaintiff. At Laurelton, plaintiff shares a "room" with two other women. This room is actually a small part of a much larger room that has been divided into small bedroom areas with partitions that are three-quarters of the height of the ceiling. Plaintiff testified that there are no doors in her cottage at Laurelton, even on the bathroom. Plaintiff has little ability to structure her sleeping time at Laurelton. She testified that there was a "curfew" imposed with a strict eleven o'clock "lights out" policy. In addition, she testified that she would like to be able to shop for her own clothes in the community and

to do her own food shopping and preparation. Mr. McFall testified that plaintiff cannot do any of these things while she remains at Laurelton. At the very least, she is unable to engage in the full range of these activities while at Laurelton.

In addition, although work activities are available at Laurelton, it is obvious that they are not of the same variety as those available to her in the community. Plaintiff stated her strong desire to work and earn money which she obviously enjoys spending. This motivation was considered a strong factor by both McFall and Spangler in their conclusions that plaintiff would make a good candidate for a CLA.

Plaintiff obviously desires to be placed in a CLA very much. Indeed, both McFall and Spangler testified that

the failure to place her in such a program has made her so frustrated that her behavior has deteriorated. McFall testified that plaintiff's self-esteem has been adversely affected by her continued stay at Laurelton especially in light of the fact that many of her former friends who functioned at similar levels as she does have left for CLAs. There was additional testimony that plaintiff's behavior is in a "downward spiral" as a result of her continued frustration at remaining at Laurelton. This testimony was, however, strongly contested by staff members of Laurelton. The Superintendent of Laurelton, defendant S. Reeves Powers, testified that plaintiff's behavior has always been variable and that she frequently became more aggressive for periods of time. He stated that her

behavior has not gotten consistently worse over the years. He admitted, however, that a continued stay at Laurelton would cause her emotional harm.

Kay Stewart, who is employed at Laurelton as a psychological services associate, supported Powers's view of plaintiff's behavior. Indeed, she testified that plaintiff's behavior has gotten better since 1981. I believe, however, that Stewart's testimony does not deserve much weight. She does not hold a degree in psychology per se and is not licensed in that field. She professed that she did not have deep background in the psychological literature. Moreover, I found that her testimony was often self-serving and that at times it was not forthright. For example, she relied on Exhibit C-15 which is a bar graph showing plaintiff's

"continued stay assessment" scores over time. This exhibit was admitted to show that plaintiff's scores did not decline over time. The 1985 score was, however, made on the basis of a new test and could not be compared with earlier scores. On cross-examinations, Stewart admitted that the inclusion of this score in C-15 and her reliance on it were "unfair". For these reasons, I find that Stewart's testimony should be given little weight. I do, however, believe that those with the closest ability to observe plaintiff over a long period of time have the best ability to assess any changes in her behavior. I therefore must conclude that there have not been any long term trends in her behavior as a result of her being denied a CLA.

To understand fully the circumstances which have given rise to plaintiff's present plight, it is necessary to sketch briefly the complicated relationship between local and state authority and responsibility in the provision of services to mentally retarded citizens. Both areas of government have some responsibility in this area. The responsibilities of the state include: ensuring the availability of adequate mental retardation services to all those who need them; making and enforcing regulations to implement the Mental Health/Mental Retardation Act; consulting with the various counties and assisting them in carrying out their mental retardation functions; operating state facilities, and supervising mental

retardation facilities, services, and programs. The counties (and with respect to this action, Philadelphia County) have the duty to cooperate with the state to ensure that services are available.

In addition, defendant Surles, who is the Mental Health and Mental Retardation Administrator for the County of Philadelphia, is responsible for establishing an organizational unit or units consisting of multi-disciplinary professional staff capable of providing and planning appropriate services for mentally retarded persons in need of such services from the county. These organizational units are known as "Base Service Units" ("BSUs"). The County has contracted with several BSUs each of which serves individuals from a different

area of the City of Philadelphia. Defendant Centralized Comprehensive Human Services, Inc. operates the John F. Kennedy Community Mental Health and Mental Retardation Center ("JFK MH/MR") which is the BSU responsible for serving plaintiff. The obligations of JFK MH/MR are described in some detail in the stipulation of facts and I will not recite them here. It is unfortunate, but true, however, that although nominally responsible for the provision of services to plaintiff, JFK MH/MR apparently has no records in its possession concerning plaintiff from the time of her commitment until 1976. Since 1976, however, plaintiff's BSU has been repeatedly advised by Laurelton staff that plaintiff should not be institutionalized and should be placed

in a CLA. JFK MH/MR, in fact, attempted to have Philadelphia's mental health and mental retardation program arrange a CLA placement for plaintiff. Like all other attempts to transfer plaintiff from Laurelton, however, this never resulted in any change in plaintiff's treatment.

Although all the available professional opinion strongly favors a CLA for plaintiff, and has for the last nine years, plaintiff remains at Laurelton. The primary forces which have kept her there appear to be bureaucratic ineptitude and insufficient allocations of funds to community residence programs. Mr. Paul Hindman testified at the May 29, 1985 hearing regarding the process by which mental retardation services are funded by the state. He is currently director of the DPW's Bureau of Planning and Resource

Allocation. He testified that DPW has allocated approximately $500 million for mental retardation services for the present fiscal year and that over one-half of this money goes to state institutions. Only 23% goes to community residential programs. He also testified that each year some of the money allocated to the counties for community residential programs is not spent. These "carryover funds" are then reallocated during the next fiscal year to other counties. DPW has the discretion to reallocate this carryover, at least to some degree. In spite of the fact that plaintiff's plight has been known by those at Laurelton, JFK MH/MR, and the County for many years, Hindman testified that no money has ever

been sought or proposed to fund a CLA for plaintiff. Indeed, in the DPW budget for the 1985-1986 fiscal year, there was no increase for non-Pennhurst community placements at all. [2]

II. DISCUSSION

A. Introduction

Plaintiff makes a number of specific contentions in support of her motion for injunctive relief. She claims that the actions of the defendants have violated § 504 of the

---

[2]Apparently the state and counties have been struggling with providing community placements for former residents of the Pennhurst State School. Defendant Jennifer Howse wrote to defendant Richard Surles on July 20, 1984, to inform him that the state would provide funding for 27 community placements for non-Pennhurst clients. Exhibit P-13. This money was never allocated to Philadelphia, however.

Rehabilitation Act of 1973, 29 U.S.C. § 794(a). She also claims that she has been deprived of her liberty without due process and that she has had her substantive rights under the due process clause violated. Defendants[3] deny that plaintiff has been the victim of actionable discrimination under the Rehabilitation Act and contend that no constitutional violations have occurred. In addition, they argue that the relief plaintiff seeks is inappropriate.

---

[3]Although, defendants employed by the County of Philadelphia and those employed by JFK MH/MR have settled for the purposes of this motion, I will not limit the term defendant in this discussion solely to the Commonwealth's employees.

At the hearing on this matter, plaintiff requested that her motion for preliminary relief be treated as one for a permanent injunction. Although in most cases I would have given all parties advance notice of my intention to accelerate a hearing on a permanent injunction, defendants did not object to plaintiff's proposal either in court or in their post-hearing supplemental memoranda. I will therefore treat plaintiff's present motion as one for a permanent injunction. See Fed. R. Civ. P. 65(a).

The power to grant a permanent injunction rests with the sound discretion of the trial court. Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1966). The court may grant a permanent injunction after a hearing if

there are no material issues of fact and the issues of law have been correctly resolved. See Standard Oil Co. of Texas v. Lopeno Gas Co., 240 F.2d 504 (5th Cir. 1957).

Plaintiff states claims on both statutory and constitutional grounds. The federal courts have long been directed to decide whether causes of action can be supported on statutory grounds before they adjudicate constitutional law issues. See Hagans v. Lavine, 415 U.S. 528, 543 (1974); Silver v. Louisville & Nashville R.R. Co., 213 U.S. 175 (1909). I will therefore address plaintiff's Rehabilitation Act argument first.

B. Rehabilitation Act

Plaintiff advances a claim under the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Act"). Introduced in the House of Representatives on December 9, 1971 and in the Senate on January 20, 1972, § 504 of the Act was framed initially as an amendment to the Civil Rights Act of 1964. Although it ultimately became part of another act, its language and intent were patterned after other civil rights legislation, especially Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and Title IX of the Education Amendments of 1972, 20 U.S.C. §1681(a). Section 504 states:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his

> handicap be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

29 U.S.C. § 794.

Senator Humphrey, the primary Senate sponsor of the bill, said when introducing it:

> I introduce ... a bill ... to insure equal opportunities for the handicapped by prohibiting needless discrimination in programs receiving Federal financial assistance ... The time has come when we can no longer tolerate the invisibility of the handicapped in America ... I am calling for public attention to three-fourths of the Nation's institutionalized mentally retarded, who live in public and private residential facilities which are more than 50 years old, functionally inadequate,

> and designed simply to isolate these persons from society ...These people have the right to live, to work to the best of their ability - to know the dignity to which every human being is entitled But too often we keep children, whom we regard as "different" or a "disturbing influence" out of our schools and community activities altogether ... Where is the cost-effectiveness in consigning them to ... "terminal" care in an institution? These are people who can and must be helped to help themselves. That this is their constitutional right is clearly affirmed in a number of recent decisions in various judicial jurisdictions.

118 Cong. Rec 525 (1972).

Unfortunately, Congress apparently assumed that § 504 would be enforced as had previous civil rights

legislation and provided no specific authorization for rule-making in the statute. This situation was remedied when President Ford signed Executive Order No. 11,914 on April 28, 1976 which required the secretary of the Department of Health, Education, and Welfare (now the department of Health and Human Services) to promulgate regulations for the enforcement of § 504. It was not until 1977, however, that such regulations were published. See Cherry v. Mathews, 419 F. Supp. 922 (D.D.C. 1976).

At the Supreme Court has recognized, these regulations are especially helpful in interpreting the congressional intent in passing § 504. This is true because the responsible congressional committees participated in

their formation and both those committees and Congress as whole endorsed the final product. See Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248, 1254-55 & n.15 (1984). Plaintiff relies in particular on 45 C.F.R. §§ 84.4(b)(1)(i)-(iv) which state:

> (b) Discriminatory actions prohibited. (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:
>
> (i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;
>
> (ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

The term "equally effective" is defined in the regulations as:

(2) For purposes of this part, aids, benefits and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and non-handicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same

> benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

45 C.F.R. § 84.4(b)(2). These regulations emphasize that, "although separate services must be required in some instances, the provision of unnecessarily separate or different services is discriminatory." 20 C.F.R. Part 84, Appendix A, ¶6.

With these general considerations in mind, I will now turn to the specifics of plaintiff's Rehabilitation Act claim.

Plaintiff alleges that the provision of services to her at Laurelton discriminates against her in

violation of the act.[4] She alleges that because other similarly situated people are provided services in more integrated settings such as in CLAs, her retention at Laurelton constitutes unnecessarily separate or different treatment which the regulations declare discriminatory.

In order to state a claim under § 504,[5] plaintiffs must prove that 1)

---

[4]Plaintiff does not assert that § 504 requires deinstitutionalization as a general matter. I note that this claim has not been warmly received by the courts. See, e.g., Kentucky Ass'n for Retarded Citizens v. Conn, 510 F. Supp. 1233, 1243-44 (W.D. Ky. 1980), aff'd, 674 F.2d 582 (6th Cir.), cert. denied, 103 S. Ct. 457 (1982).

[5]Although the Supreme Court has assidiously avoided this question, see, Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248, 1252 n.7 (1984), I believe that it is well established that plaintiff possesses a private cause of action under § 504. Doe v. Coluatti. 592 F.2d 704, 708 n.8 (3d Cir. 1979).

they are handicapped within the meaning of the Act, 2) that they are "otherwise qualified" for the services sought, 3) that they were excluded from the services sought solely by reason of these handicaps, and 4) that the program in question receives federal financial assistance. Strathie v. Department of Transp., 716 F.2d 227, 230 (3d Cir. 1983); Doe v. New York University, 666 F.2d 761, 774-75 (2d Cir. 1981).

It is beyond dispute that plaintiff is a handicapped person within the meaning of the Act. Doe v. Region 13 Mental Health Mental Retardation, 304 F.2d 1402 (5th Cir. 1983). I also believe that the parties do not dispute that plaintiff is "otherwise qualified" for the services she contends are being denied to her: a CLA. Indeed, given the record developed in this case, I

would have no hesitancy finding plaintiff to be so qualified even if I did believe that it was disputed.

Defendants do contest, however, the other two requirements set forth above. Defendants argue that plaintiff has not been the victim of discrimination solely on the basis of her handicap. They also argue that she had not made the necessary showing that the "federal funding" requirement of the Act has been met.[6]

---

[6] Defendants make two preliminary arguments regarding plaintiff's claim that they have violated the Rehabilitation Act. They argue that the Act does not reach discrimination among groups of handicapped persons. The only authority cited in support of this theory is dictum from Colin K. v. Schmidt, 715 F.2d 1, 9 (1st Cir. 1983). At least in this circuit, however, the cases have

(FOOTNOTE CONTINUED)

FOOTNOTE CONTINUED

allowed claims under the Act involving assertions of discrimination between classes of handicapped persons. See Doe v. Coluatti, 592 F.2d 704 (3rd Cir. 1979) (challenging a Pennsylvania statute which discriminated against mentally handicapped persons vis-a-vis physically handicapped persons) see also 45 C.F.R. § 84.4(b)(1)(iv) (discrimination can be found in provision of unnecessarily different or separate services "to any class of handicapped persons.").

Defendants also argue that the Rehabilitation Act does not require "affirmative actions" such as those sought by plaintiff. They rely on language to that effect in a number of Supreme Court cases construing the Act. See, e.g., Smith v. Robinson, 52 U.S.L.W. 5179, 5186 (July 5, 1984) (case involving reconciliation of 42 U.S.C. § 1983, § 504, and the Education of the Handicapped Act, 20 U.S.C. § 1415); Southeastern Community College v. Davis, 442 U.S. 397, 411 (1979). This reliance is misplaced. As the Court explained in Alexander v. Choate, 105 S. Ct. 712, 721 n.20 (1985) the Act requires elimination of existing obstacles to the participation of the

FOOTNOTE CONTINUED ON NEXT PAGE

Defendants argue that the reason that plaintiff has been detained for twenty-nine years at Laurelton has nothing to do with her handicap, but is merely a result of inadequate funding. They argue that funds are simply not adequate to provide CLAs for all those who could benefit from them and that the available funds are disbursed in a nondiscriminatory fashion. I do not believe that defendant's argument is correct in all of its implications. I

---

handicapped in federally funded programs. The Act does not, however, require "'changes,' 'adjustments,' or 'modifications' to existing programs that would be 'substantial' ... or that would constitute 'fundamental alterations in the nature of a program' ... rather than ... those changes that would be reasonable accommodations."

Plaintiff's requested relief in this case does not seek the widespread institutional changes or the dramatic changes in program organization that Alexander v. Choate held were beyond the scope of the Act.

do believe, however, that plaintiff has failed to show that she has been discriminated against solely on the basis of her handicap as required by the Act.

Plaintiff is mildly retarded. She lives at Laurelton with individuals of varying levels of retardation. There are also people with varying levels of retardation already placed in CLAs. I cannot explain the reason that plaintiff has not been given a CLA, and defendants could not offer any real explanation either, aside from a chronic lack of funds or bureaucratic misplacement of plaintiff over the years. Although I do not find these explanations satisfying, I cannot conclude that plaintiff has been detained at Laurelton solely because of her handicap as required by the Act.

The Act prohibits discrimination against those who are handicapped based on that handicap where the person is otherwise qualified for the receipt of the funds or the services in question. The statute makes clear, however, that this discrimination must be based "solely" on the existence of a handicap. Plaintiff is alleging that she has been the victim of discrimination vis-a-vis other handicapped people. More precisely, she alleges that other mentally retarded people receive services for which she is also qualified and that she is harmed as a result. There is no allegation, however, that plaintiff is denied a CLA because she is mildly retarded as opposed to severely or borderline retarded. If plaintiff had alleged and proved that she was denied a CLA because

of her handicap and that the provision of services was operating to deny her a benefit on the basis of that handicap, she would have stated a claim under the Act. She has not, however, proved this theory.

There are painfully few cases which address this issue. In Plummer v. Branstad, 731 F.2d 574 (8th Cir. 1984), plaintiffs challenged the state's decision to shift them from a federally funded treatment program to a state funded institutional program. The court concluded that the plaintiffs had not stated a claim under the Rehabilitation Act because they had not been excluded from services solely by reason of their handicap. The court stated "the criterion upon which the plaintiffs were

excluded from Title XX funding, [the federal program] ... on its face had nothing to do with their individual abilities, backgrounds, or circumstances." Id. at 578. The court found that the basis of the transfer was that the plaintiffs received twenty-four hour a day treatment and care in a state run facility which provided substanti- ally the same services as those obtained from the federally funded agency. Id. The court concluded that the basis of the distinction drawn between plaintiffs and those who continued to receive the federally funded services was not the plaintiffs' handicaps per se, but rather their residence at a facility which provided essentially the same services to them at state expense. I recognize that Plummer rested on a magistrate's finding that the services available to

plaintiffs were substantially the same as those available to them in the federally funded program. Indeed, the court went on to state that were it not for this fact, "[s]ection 504 would prohibit a distinction based solely on ... residence, given that persons live in [institutions] only because of their handicapped status." Id. at 579. Although this language would seem to suggest that plaintiff in the instant case would be entitled to relief under the Act, a careful review of the facts of Plummer reveals that it is sufficiently different from the instant case to make this language inapposite here.

Plaintiffs in Plummer were persons who were institutionalized in facilities known as an intermediate care

facilities ("ICFs"). These facilities were designed to provide twenty-four hour a day care for persons who required such care for medical reasons. The state also operated other facilities that did not house those in need of constant medical care. Thus the plaintiffs in Plummer who all lived in ICFs were housed in those facilities only because of certain aspects of their handicaps. By contrast, plaintiff has been housed at Laurelton, not because of any particular aspect of her handicap, but simply because she is handicapped. There are people at Laurelton who are more profoundly retarded than plaintiff and who function at lower intellectual and social levels. There may be individuals there who function at a higher levels as well. Unlike the plaintiffs

in Plummer, therefore, Laurelton residents cannot be classified solely on the basis of their handicap relative to other mentally retarded people who are in CLAs. That is, the same general mix of mentally retarded people live in CLAs as live in Laurelton. Thus to say that plaintiff resides at Laurelton is not the same as saying that she has any particular form of handicap other that mental retardation and plaintiff only contends that she is discriminated against vis-a-vis other mentally retarded persons. See also Vickers v. Veterans Administration, 549 F. Supp. 85, 87, (W.D. Wash. 1982) (employee of Veterans Administration could not prove that he was a victim of discrimination at work solely by reason of his handicap where he had received good job reviews in spite of his complaints regarding the

adverse health effects of his work); cf. Coates v. Illinois State Bd. of Educ., 559 F.2d 445, 449 (7th Cir. 1977) (plaintiffs had not stated a claim under Title VI, 42 U.S.C. § 2000d, where they had only alleged that a school district had provided equal services to racially imbalanced school population).

I wish to emphasize that my decision here does not apply to a situation in which a plaintiff files suit under the Act alleging that she or he has been discriminated against vis-a-vis other handicapped persons and where that person can point to some trait related to his or her handicap as defining the class of persons discriminated against. For example, if a plaintiff alleged that he or she was kept in an institution and denied a CLA

because of the level of his or her handicap and that person were otherwise qualified for the CLA, my decision in this case would not control.

I also wish to emphasize that I have not assumed that the Act reaches only to intentional discrimination. In Alexander v. Choate, 105 S. Ct. 712 (1985), the Court held that not all actions under the Act required proof of intentional discrimination. In at least some circumstances, the court held that proof of disparate impact was all that was required. My decision here is not that the actions of the defendants do not violate the Act because they did not choose to keep plaintiff at Laurelton out of a conscious desire to discriminate against her on the basis of her handicap, but rather that the basis of

the discrimination (whether intentional or unintentional) was not a factor related to the handicap plaintiff claims forms the basis or the discrimination.

Plaintiff relies on a number of cases to support her claim that she has been the victim of prohibited discrimination. In Halderman v. Pennhurst State School & Hospital, 446 F. Supp. 1295, 1323-1324 (E.D. Pa. 1977), aff'd on other grounds, 612 F.2d 84 (3d Cir. 1979) (en banc), rev'd, 451 U.S. 1 (1981); on remand 673 F.2d 647 (3d Cir. 1982) (en banc), rev'd, 104 S. Ct. 900 (1984) (The relevant portion of the original district opinion has not been addressed by the appellate decisions), Judge Broderick of this court held that the segregation of the handicapped in an isolated institution

such as Pennhurst without minimally adequate habilitation constituted a violation of the Rehabilitation Act. He stated:, "[w]e hold ... that under Section 504 unnecessarily separate and minimally inadequate services are discriminatory and unlawful." Id. at 1323-24. Pennhurst, of course, involved a broad challenge to the very existence of Pennhurst State School based on a variety of different legal theories. In their Rehabilitation Act claims, plaintiffs therein argued that the segregation of mentally retarded persons into an institution like Pennhurst was actionable discrimination under the Act.

In determining that defendants had violated the Rehabilitation Act, the Pennhurst court concluded that in enacting the Act, Congress had effectively codified the constitutional right to

equal protection. Id. at 1323. Because the court had already determined that the segregation of mentally retarded persons at Pennhurst violated the equal protection clause, it concluded that the Rehabilitation Act had also been violated. Id. Judge Broderick's conclusion was based on Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972). He held, in effect, that the equal protection clause prohibited the segregation of the mentally retarded in an isolated institution where habilitation does not measure up to minimally adequate standards. Id. The court did not, however, detail this theory and did not state whether the basis of its decision was a finding that the mentally retarded

were a suspect class or whether education was a fundamental right. There is also no discussion of the equal protection analysis used to evaluate these claims. Although other aspects of Pennhurst received large amounts of appellate discussion, this particular aspect of the district court decision was not reviewed because the Third Circuit felt compelled to rest its decision on statutory rather than constitutional grounds and therefore did not reach this holding. See 612 F.2d at 94. Three dissenting judges of the en banc court did, however, reach this holding. They concluded that the state had a rational basis for the classification chosen. See id. at 130 (Seitz, Ch. J., Aldisert and Hunter JJ., dissenting).

Similarly, in Association for Retarded Citizens of N.D. v. Olson, 561 F. Supp. 473, 493 (D.N.D. 1982), aff'd on other grounds, 713 F.2d 1384 (8th Cir. 1983), the court held that the Act mandates that a state give the mentally retarded equal educational opportunity. Id. In Olson, plaintiffs challenged treatment and conditions at two state hospitals. They sought alternatives to treatment at those facilities. The court held that as between mentally retarded people and those who are not mentally retarded, the equal protection clause of the fourteenth amendment required the state to justify its discrimination against the mentally retarded by at least showing that "disparities in educational opportunity which exist between the mentally retarded and other citizens substantially

furthers important state interests." Id. at 490.[7] The court also concluded that plaintiffs claims of discrimination among classes of mentally retarded people (those in institutions and those who live in community placements) were best evaluated under a rational basis test. Id. The court's holding under the Act was expressly predicated upon a conclusion that the Act and the equal protection clause were essentially the same in terms of prohibiting certain forms of discrimination against the handicapped. Assuming that the court's

---

[7]The decision that mentally retarded persons are a suspect class deserving of at least intermediate scrutiny appears to be inconsistent with the present law of this circuit. See Doe v. Coluatti, 592 F.2d 704, 710-11 (3rd Cir. 1979).

analysis of the plaintiffs' equal protection claims was correct, I believe that its conclusion that the rational basis test applies to claims of discrimination between classes of mentally retarded people effectively means that it would have had to find virtually all such discrimination permissable. I have read the Olson decision carefully and find no holding therein which suggests that the court invalidated, or meant to enjoin, any discrimination between those in institutions and those in community placements.

Finally, plaintiffs relies on Garrity v. Gallen, 522 F. Supp. 171, 205-218 (D.N.H. 1981) a case similar to Pennhurst in which plaintiff challenged the conditions at a state school for the mentally retarded. The court rejected

the conclusion reached by Judge Broderick in Pennhurst and concluded that the Act does not provide a broad mandate for deinstitutionalization per se. Id. at 213. The court did, however, conclude that the defendants had violated the Act in a number of ways. For example, the court held that the defendants' decision to deny to some residents a individualized service plan was discriminatory. These plans were only developed for some of the residents of the institution and the distinction drawn was based on residence in certain of the buildings at the institution. Some of the buildings at the institution housed disproportionate numbers of severely and profoundly retarded persons. Id. at 184. Thus the decision to deny services to residents of these buildings was, in effect, a decision to

deny services to disproportionate numbers of severely and profoundly retarded persons. The court also held that it was a violation of the Act for the administrators of the institution to make decisions regarding the suitability of treatment based on general assessments of classes of institutionalized mentally retarded persons. In other words, it was impermissible to deny treatment to severely or profoundly retarded persons based on a general conclusion that persons functioning at that level could not benefit from the treatment. Rather, the court concluded that the Act required individual assessments of the residents. Id. at 214-218.

Each of these three cases is distinguishable from the present one on a number of grounds. Pennhurst and Olson

both involved claims that the plaintiffs therein were discriminated against vis-a-vis other nonhandicapped people. Moreover, both rest on 1) the assumption that the Rehabilitation Act was meant to codify the equal protection clause, and 2) the conclusion that plaintiffs' rights under that clause had been violated. Moreover Olson does not expressly state that the discrimination between classes of handicapped persons at issue there violated the equal protection clause or the Act. Similarly, Garrity involved distinctions between classes of handicapped persons based on the severity of their handicaps.

I have already concluded that plaintiff has not been discriminated against solely by reason of her handicap. I believe that this conclusion

renders Garrity inapposite. The fact that Pennhurst and Olson involve claims of discrimination between handicapped persons and non-handicapped persons renders those decisions equally inapposite. Furthermore, although I do not reach this question, I question the correctness of the equal protection analysis employed in those cases which forms the basis of the Rehabilitation Act holdings in both.

For the foregoing reasons, I must reject plaintiff's claim under the Rehabilitation Act of 1973.[8]

---

[8]Because I have determined that plaintiff has failed to show that she has been the victim of discrimination based "solely on her handicap," I need not reach defendant's second argument that she has failed to prove that the program she is alleging is discriminatory is a recipient of federal funds as required by the Act. Defendants rely

FOOTNOTE CONTINUED ON NEXT PAGE

C. Constitutional Claims

Plaintiff contends that the defendants' treatment of her over the years has deprived her of her constitutional rights in a number of ways. She

---

FOOTNOTE CONTINUED

on Grove City College v. Bell, 52 U.S.L.W. 4283 (Feb. 28, 1984). In that case brought under Title IX, the Court held that receipt of federal student aid by some college students did not trigger institution-wide coverage under Title IX. Rather, the Court concluded that only the college's financial aid programs were covered by virtue of the limited nature of federal aid received. During the hearing on this matter, plaintiff demonstrated that the Commonwealth receives federal funds for mental retardation services and for community residential programs in general. Although plaintiff did not prove that the specific CLA program she desires is federally funded, I do not think that such specific proof of federal funding is necessary even under Grove City College. I note that at least two bills are presently pending before the Subcommittee on Education of the Senate Labor and Human resources Committee which seek to "clarify" the meaning of Title IX in light of Grove City College. See S. 272 & S.431, 99th Cong. 1st Sess. (1985).

contends that her initial commitment deprived her of liberty without due process; that the failure to hold any hearing over the course of her twenty-nine years at Laurelton constituted a similar deprivation without due process; that her substantive due process rights have been violated, and that she has been denied access to the courts through the failure of the defendants to respond to her repeated requests for a hearing or for legal assistance. This case presents many difficult legal issues and I have considered plaintiff's constitutional claims with great care. I have concluded that plaintiff is entitled to the relief she seeks in order to remedy the present, on-going actions taken by defendants in derogation of plaintiff's

rights. Plaintiff's claims can be grouped into three areas: procedural due process, substantive due process, and denial of access to the courts.[9]

1. Procedural Due Process

"There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the state cannot accomplish without due process of law." O'Connor v. Donaldson, 422 U.S. 563, (1975) (Burger, C.J., concurring). Plaintiff alleges that her initial commitment as a minor was accomplished without sufficient protections and that she was denied due process as a result.

---

[9]Because of my decision concerning plaintiff's due process claims, I need not reach her claims of denial of access to the courts.

The starting point for an analysis of this claim is Parham v. J.R., 442 U.S. 584 (1979) a case in which the Supreme court examined the process required by the constitution in the commitment of a minor. In Parham, the plaintiffs were minors who were committed by their parents or by the state as their legal guardian. They challenged the procedures under which they were committed as well as several substantive aspects of the state's treatment of voluntarily committed minors. The district court held that the state's procedures were defective in that they did not require that commitment take place only after notice and hearing. The Supreme Court reversed.

The Court found that a child, like an adult, has a substantial liberty interest in not being confined

against his or her will for treatment in a mental hospital. Id. at 600. (Citing Addington v. Texas, 441 U.S. 418, 425 (1979); In Re Gault, 387 U.S. 1, 12-13 (1967); Specht v. Patterson, 386 U.S. 605 (1967)). The Court assumed that this interest stemmed from both the child's interest in being free from bodily restraint and from the child's interest in not being stigmatized by the label attached to one who has been committed. The court found, however, that parents retain "a substantial, if not dominant" role in decisionmaking for their children and that it could be assumed that they act in the best interests of their children. Id. at 604.

The Court concluded that although parents "retain plenary authority to seek, [commitment] for their children," id., the risk of error

inherent in this parental decision required "that some kind of inquiry should be made by a 'neutral factfinder' to determine whether the statutory requirements for [commitment] are satisfied." Id. at 606. The court went on to hold that this factfinder need not be trained in the law and that the "factfinding" need not be a formal or "quasi-formal" hearing. Due process, the Court concluded, is not violated by reliance on formal medical investigative techniques. Id. at 607. Thus, commitment of a child by his or her parents or guardians comports with due process if there is some form of inquiry into the underlying facts of the case, conducted by a neutral factfinder who may or may not be a judicial officer. A medically trained specialist in the field of mental health will suffice.

Plaintiff alleges that she has been denied liberty without due process. She alleges that her initial commitment was defective because it failed to provide her with any notice or hearing prior to the commitment. It appears from the stipulated facts of this case that plaintiff was ordered to be committed to Laurelton on November 9, 1956 on the basis of a petition filed the day before by the Deputy Commissioner of Public Welfare for the City of Philadelphia. This petition was based on the certification of Dr. Donald Davidson, who examined plaintiff on June 22, 1956 and found her to have a "mental defect-severe." Plaintiff Exhibit 1. Two days after the commitment order was signed, plaintiff was sent to Laurelton.

At the time of her commitment, plaintiff was a resident of the Youth Study Center, a juvenile detention center in Philadelphia.

Based on the record developed at the hearing on May 28, 1985 and May 29, 1985, I cannot say that the requirements of Parham have not been met. The record as it stands now simply does not contain enough information concerning the circumstances surrounding plaintiff's initial commitment to Laurelton. For example, although she was a resident of the Youth Study Center at the time of her commitment, there is no solid evidence in the documentary material produced by the parties concerning her legal status at that time. In addition, there is no real evidence concerning the nature of the inquiry made into plaintiff's condition

before she was committed. Because the record at this point is deficient in these crucial areas, I cannot determine whether the minimal due process required under Parham was provided at plaintiff's initial commitment.[10]

After her initial commitment, plaintiff was taken to Laurelton where she has remained to this day. During the twenty-nine years since her commitment, a number of events have occurred which plaintiff claims should

---

[10]Plaintiff argues that Parham is inapplicable because it does not apply to commitment made without parental consent. Parham does, however, apply to commitments made at request of the state acting as ward. See 442 U.S. at 617-620. The Court concluded that the differences between the roles of parents and the state acting as guardian were not sufficient to require a change in the required procedures.

have triggered a review of her commitment. These events include: her reaching maturity in 1962; the repeal of the Mental Health Act of 1951 under which plaintiff was committed in 1966, and a court decision which held certain relevant aspects of the Mental Health Retardation Act of 1966 ("1966 Act") unconstitutional in 1976. I will now examine these claims.

Plaintiff reached the age of twenty-one in 1962, six years after she was sent to Laurelton. She argues that the defendants were under an obligation to review her commitment at that time. Although she cites no explicit authority for this argument, I agree with her conclusion.

Plaintiff was committed without notice or hearing. This lack of the usual accoutrements of due process may not be a constitutional violation in the

context of the commitment of a minor by a parent or guardian; that is the teaching of Parham. There can be no question, however, that an adult cannot be involuntarily committed without substantially more of the guarantees traditionally associated with the concept of due process.

Although I will not discuss them at length, the courts have long considered the commitment of an adult such a massive curtailment of liberty as to require a wide range of procedural protections. For example in Commonwealth ex rel. Finken v. Roop, 233 Pa. Super. 762, 339 A.2d 764 (1975), the court held that civil commitment under § 406 of the 1966 Act requires at the minimum: notice, a hearing, the exclusion of hearsay evidence at that hearing, and evidence sufficient to prove

the state's case by "clear, unequivocal, and convincing" evidence. See also Dixon v. Attorney Gen'l of Pennsylvania, 325 F. Supp. 966 (M.D. Pa. 1971) (declaring § 404 of the 1966 Act unconstitutional on its face; relief ordered included a broad range of procedural protections). The full scope of these decisions is not really relevant to the present case, however, because plaintiff has never been accorded any significant review of her commitment at any time.

Defendants argue, however, that they have done all that due process requires in terms of periodic review. They contend that Parham requires only a medical review by a neutral factfinder and that plaintiff has had such reviews in the past and continues to have them. This argument is unpersuasive.

Parham dealt only with the commitment of minors by their parents or legal guardians. The Court's decision rested very heavily on the assumptions that both parents and guardians act in the best interests of the child and that both have traditional authority over the raising of minors in their care. This aspect of Parham makes it inapposite to a situation involving someone who is not a minor. Once someone becomes an adult, one's parents lose that degree of authority found so crucial in Parham. Moreover, as even the Parham Court found, there is a possibility (born out by this case) that a "ward" of the state who is committed may become "lost in the shuffle." 442 U.S. at 61 . This possibility lead the court to conclude that there might be a basis for requiring that the review of such persons be subjected to more stringent require-

ments then review of those committed by their parents.

The Commonwealth's argument in this area is far too broad. It argues, essentially, that if someone is committed by a parent or guardian after the minimal due process required by Parham, there need never be anything more than periodic medical reassessment of the committed person. This argument certainly sweeps too broadly.[11]

---

[11]A comparison with Vitek v. Jones, 445 U.S. 480 (1980) reveals the overbreadth of this argument. In Vitek, the Supreme Court held that a prisoner serving sentence had sufficient residual liberty interests to require a full panoply of due process procedures before he or she could be transferred involuntarily to a mental hospital. In Youngberg v. Romeo, 457 U.S. 307, 315-16 (1982), the Court implied that the rights of an institutionalized person should be at least as great as those of a convicted prisoner serving sentence. The institutionalized mentally retarded must have at least as great an interest in their liberty as a prisoner serving sentence.

Plaintiff also argues that the state was obligated to review her commitment in 1966 when the 1951 Act was repealed and replaced by the 1966 Act. With that event, the only legal basis for commitments such as plaintiff's became § 406 of the 1966 Act, 50 P.S. § 4606. Indeed, the defendants treated plaintiff's commitment as equivalent to one under § 406. Stipulation ¶70. The differences between § 326 of the 1951 Act under which plaintiff was committed and § 406 of the 1966 Act were, however, largely procedural. The standards for commitment were left relatively unchanged. Plaintiff never received a hearing under the 1966 Act. Indeed the parties have stipulated that there is no procedure in force under which persons

with indefinite commitments are periodically reviewed, although James Pelter testified that those who are not committed for an indefinite period are reviewed.

Plaintiff argues that a review is mandated when there is some change in the legal basis or circumstances underlying the commitments. In Jackson v. Indiana, 406 U.S. 715 (1972), the Supreme Court invalidated a state statute which allowed for indefinite commitment of a criminal defendant solely because he was incompetent to stand trial. The court found that this indefinite commitment violated due process. The court held that such a person could not be held "more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain" the capacity to stand trial in the future.

Id. at 738. The Court stated:, "[a]t the least, due process requires that the nature and duration of commitment bear some relation to the purpose for which the individual is committed." Id. See also McNeil v. Director, 407 U.S. 245 (1972).

Similarly, in O'Connor v. Donaldson, 422 U.S. 563 (1975), the Court held that the state cannot hold, without more, a nondangerous individual who poses no danger to himself or to the community based simply on a determination that the person is mentally ill. In reaching this holding, the court stated:

> The fact that state law may have authorized confinement of the harmless mentally ill does not itself establish a constitutionally adequate purpose for that confinement ... [n]or is it enough that

> Donaldson's original commitment was founded upon a constitutionally adequate basis, if in fact it was, because even if his involuntary confinement was initially permissible; it could not constitutionally continue after that basis no longer existed. 75.

Id. at 574-(citations omitted)

Plaintiff has cited no compelling caselaw in support of her argument that is more directly on point. The Commonwealth defendants in their brief opposing plaintiff's motion for preliminary relief, however, admit that plaintiff is entitled to periodic review of her commitment. Commonwealth's brief in opposition to plaintiff's motion for preliminary relief at 12. They dispute only the nature of the review. Once again, they argue that only the limited due process required under Parham is required.

Although the Supreme Court has repeatedly emphasized that due process is a flexible concept which varies according to the particular nature of the interest at stake and the facts of the particular case, this truism is not a sufficient basis for a conclusion that the minimal requirements of Parham should apply to this situation. I do not believe that Parham should be extended beyond the setting in which it arose: the voluntary commitment of minors at the request of a parent or guardian. I have already concluded Parham should not be applied to a commitment of an adult. I see no reason to change that view simply because the event triggering the review is the repeal of the legal authority under which a person is committed.

Moreover, although plaintiff has received some form of medical or psychological review periodically, the results of these reviews have been a nullity. Since at least 1976, these reviews have consistently recommended that plaintiff be removed from Laurelton and placed in a CLA. Defendants point to this as sufficient under their interpretation of the due process clause. In reality these "professional reviews" have been a meaningless exercise. Although transfer has been consistently recommended, it has never taken place. It has never taken place because the various entities responsible for plaintiff, who act in defendants' view as her parents, have never been able to agree on how to fund plaintiff's CLA. I cannot see how due process is

served when all that takes place are periodic professional reviews whose recommendations are then ignored.

Plaintiff also alleges that she was entitled to review in 1976 when a three judge panel in the Middle District of Pennsylvania struck down § 406 of the 1966 Act. That section, of course, formed the only legal basis for the detention of plaintiff. In Goldy v. Beal, 429 F. Supp. 640 (M.D. Pa. 1976), the court held that the standard for commitment found in § 406 was unconstitutionally vague and stayed the further application of § 406. It later modified this stay to permit the commitment of persons under § 406, but required that those to be committed be evaluated under a rigorous standard that cured the deficiencies in the original section. This standard, which was later incorporated into DPW regulations stated:

"the Secretary of DPW and his agents and assigns, those under his direction, and all institution directors shall not receive ... [persons pursuant to section 406 of the MH/MR Act of 1966] except upon judicial determination that the following standard is met:

"(1) the person is impaired in adaptive behavior to a significant degree and is functioning at an intellectual level two standard deviation measurements below the norm as determined by acceptable psychological testing techniques.

"(2) the impairment and the resultant disability were manifested before the person' 18th birthday and are likely to continue for indefinite period; and

"(3) the person, because of his retardation presents a substantial risk of physical injury to himself or physical debilitation as demonstrated by behavior within 30 days of the petition which shows that he

> is unable to provide for, and is not providing for his most basic need for nourishment, personal and medical care, shelter, self-protection and safety and that provision for such needs is not available and cannot be developed or provided in his own home or in his own community without residential placement."

Plaintiff argues that Goldy destroyed the only legal basis for her commitment and that the defendants were obliged to review her commitment pursuant to the new standard. Defendants contend, however, that Goldy did not establish any obligation on their part to undertake a review of her commitment.

Goldy struck down the only legal authority under which plaintiff could have been deemed to have been

committed. Although the Goldy court recognized that its decision did not require release of those previously committed under § 406, it must mean an a minimum that those who have been committed under that section were entitled to have their commitment reviewed under the new, constitutional standard. Defendants cling to a passage in Goldy which in their view means that Goldy imposed no affirmative obligation upon them: "[plaintiffs] merely seek a declaration that the statute under which they were committed is unconstitutional and an injunction enjoining defendants from enforcing and executing the statute in its present version; if this court rules in their favor, they will then seek release in state court." Id. at 645. This language cannot be read as

broadly as suggested by defendant. First, it was taken from the court's discussion of defendants' argument there that plaintiff's appropriate action in Goldy should have been a petition for a writ of habeas corpus action rather than suit for declaratory and injunctive relief. Second, although plaintiff might have been a member of the plaintiff class in Goldy, she was committed at that time to the care of defendants. A mildly retarded person who lives in a state institution can hardly be expected to know about the decision in Goldy. Finally, plaintiff did, in fact, request a review of her commitment and has continued to do so since at least 1981. No hearing was ever arranged and her requests for legal assistance went unanswered. Indeed, the

parties have stipulated that plaintiff requested judicial review of her commitment even before Goldy. Stipulation ¶74.

It is somewhat disingenous and ironic for defendants to argue, in essence, that plaintiff should have arranged her own hearing and at the same time to place such great reliance on Parham, a case which rests on the assumption that the state as guardian acts in the best interests of its wards.[12]

---

[12]Defendants contend in connection with all of plaintiff's claims that she was entitled to periodic review, that the review need only satisfy the minimal standards of Parham. As I have previously stated, I consider this argument to be without merit, at pp. 36-37.

For the foregoing reasons, I conclude that plaintiff's rights to procedural due process have been violated by defendants' failure to provide her with any notice or hearing whatsoever during the course of her confinement in spite of the many changes both in the law and in facts of plaintiff's case which mandated that such hearings be held.

2. Substantive Due Process

Although the courts have been slow to recognize them, institutionalized persons have a number of substantive rights which are protected under the due process clause of the United States Constitution. Plaintiff argues that her substantive due process rights have been violated in a number of ways. First she alleges that Goldy creates the substantive right not to be institutionalized

unless the standards set out by the Goldy court have been met. Second, plaintiff argues that state caselaw construing the Pennsylvania statutes and regulations in this area also creates a substantive right to deinstitutionalization. Finally, although plaintiff has not argued this matter, I believe that this case implicates substantive due process rights identified in Youngberg v. Romeo, 457 U.S. 307 (1982).

Plaintiff argues in conjunction with her procedural due process arguments that Goldy mandated not only that she be given a hearing in 1976, but that she be transferred to a CLA. Plaintiff argues that the Goldy standard for commitment recognizes a right not be institutionalized unnecessarily if a community placement could not be developed.

Plaintiff alleges that a CLA could be developed for her and that she has therefore been committed to Laurelton improperly. There is no disagreement that there has never been a judicial determination that plaintiff meets these standards. One of the defendants' witnesses, Kay Stewart, testified that, in her opinion, plaintiff did meet the standards. She did not elaborate on the basis of this opinion and on cross examination it became apparent that Stewart did not have a full working familiarity with the complete Goldy standard. Neither did she have a familiarity with CLAs in Philadelphia. She did state, however, that plaintiff could live in one if one were provided or available.

Defendants argue that in any event, plaintiff meets the standards for institutional commitment contained in the modified Goldy stay. They argue that "provisions, [for plaintiff's needs] are not available and cannot be developed without residential placement." Defendants argue that this language allows institutional placement whenever there are insufficient funds or resources available to provide for non-residential services. This interpretation would effectively allow defendants to render the Goldy standard meaningless. The defendants could simply refuse to allocate funds for any community placements and institutionalize all mentally retarded persons if I were to accept the prefferred reading of Goldy. I decline to do so.

Rejection of defendant's argument is not equivalent to saying that there is a "right" to a CLA. The Goldy court struck down § 406 because the standard it contained which governed commitment of the mentally retarded was too vague to pass constitutional muster. This decision, by its nature, rests on the substantive conclusion that commitment was unconstitutional unless the person to be committed met certain basic requirements.

The Supreme Court has also held that the fact that a person is mentally retarded is, standing alone, not enough to warrant commitment: "[a] finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. Assuming that the term can be given a reasonably

precise content and that the 'mentally ill' can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and live safely in freedom." O'Connor v. Donaldson, 422 U.S. 563, 575 (1975). The Goldy standard articulates this same concern.

Although I recognize that only a thin line separates saying that plaintiff has a right not to be placed in an institutional setting if it is possible to create a CLA for her, and saying that she has a right to a CLA, it is meaningful line. Whatever the merits to defendants' argument that plaintiff has no right to a CLA, Goldy requires that she not be placed in an institutional setting unless a community placement cannot be developed. This

standard is rooted in substantive due process. Defendants have, moreover, acceded to this requirement when they incorporated it into their regulations. Whatever its origins, it is now a legal requirement for commitment. Moreover, I believe that the reading given to this language by defendants distorts its plain meaning.

The standard states that a person cannot be committed to residential placement if provision for his or her needs is not "available and cannot be developed or provided" in the community. There is no facial requirement that funding for such community orplacement be available or developed. Defendant would read this requirement into the words "cannot be developed or

provided." It is more correct, however, to read those words in light of the other requirements set forth by the Goldy court. These requirements pertain to the innate abilities and characteristics of the person to be evaluated, not to the resources of DPW. Read in this light the words "cannot be developed or provided" mean that the characteristics and needs of the person under evaluation are such that no community placement would be able to provide for them. For example, a person might be so severely handicapped both physically and mentally that no community residence could be developed which would meet his or her needs. It is beyond dispute that no such innate characteristic of plaintiff prevents her from living in a CLA.

Plaintiff also argues that a number of decisions of the Pennsylvania state courts create a substantive right to deinstitutionalization. See In Re Schmit, 494 Pa. 86, 429 A.2d 631, 635-66 (1981); In Re Sauers, 68 Pa. Commw. 83, 447 A.2d 1132 1135-36 (Pa. Commw. Ct. 1982) (en banc). Both of these cases construe Pennsylvania state statutes and regulations promulgated pursuant to them. Plaintiff seems to argue that these constructions give rise to the creation of a substantive right under the due process clause. She does not argue, by contrast, that these cases create a state liberty interest which cannot be taken without procedural due process. See Perry v. Sinderman, 408 U.S. 599 (1972). Defendants have not

'responded to this novel argument. Because the rights that plaintiff claims arise from these cases are essentially coterminous with those which arise under Goldy, I need not reach the merits of this novel argument.

Finally, I believe that defendants' treatment of plaintiff violates interests adumbrated in Youngberg. That case was an individual action in which the plaintiff, who was a profoundly retarded resident of the Pennhurst State School, alleged injury due to his own behavior, attack by others, and excessive physical restraint by the staff. He argued that his protected liberty interests in safety, freedom of movement, and training within the institution had been violated. The Court had little difficulty in deciding that plaintiff had cognizable liberty

interests and valid claims to safe conditions and freedom from bodily restraints. 457 U.S. at 315-16.

The Court had more difficulty in evaluating plaintiff's claims for "minimally adequate training." After canvassing the available precedent the Court held that plaintiff's liberty interests required the state to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint.

In determining what treatment may be required in a given case, the Court mandated that analysis should start with the generalization that there is a right to minimally adequate training. "The basic requirement of adequacy, in terms more familiar to the courts, may be stated as that training

which is reasonable in light of identifiable liberty interests and the circumstances of the case." Id. at 319 n.25.

In assessing the reasonability of training, the court "must show deference to the judgment exercised by a qualified professional." Id. at 322. The majority elaborated:

> [t]he [training] decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standard as to demonstrate that the person responsible actually did not base the decision on such a judgment.

Id. at 323. "The question suggested by Youngberg, then, is not what treatment was actually provided, but whether the

treatment decision was professionally made and falls within the scope of professional acceptability." Woe v. Cuomo, 729 F.2d 96, 105 (2d Cir. 1984), cert. denied, 105 S Ct. 339 (1985).

Although the definition of "professional" is by its nature somewhat broad, the Court did offer some guidance:

> By "professional" decisionmaker, we mean a person competent, whether by training or experience, to make that particular decision at issue. Long-term treatment decisions normally should be made by persons with degrees in medicine or nursing or with appropriate training in areas such as psychology, physical therapy, or the care and training of the retarded.

Youngberg, 457 U.S. at 323 n.30. The Supreme Court's discussion of the deference to be paid to such professional judgment makes it clear that the decision has to be one based on medical

or psychological criteria and not on exigency, administrative convenience, or other non-medical criteria.[13]

---

[13] I do not believe that the Youngberg court meant to include decisions motivated out of budgetary constraints in the category of "professional judgments." In the majority opinion, however, the Court explicitly recognizes that budgetary constraints which prevent the implementation of professional treatment recommendations may provide the factual predicate for a defense of good-faith immunity. See 457 U.S. at 323. This statement does not mean, however, that such considerations should provide a bar to prospective equitable relief. In Scott v. Plante, 691 F.2d 634, (3d Cir. 1983), the Third Circuit noted that different concerns inform the shaping of equitable and legal relief:

> [W]e note that Youngberg v. Romeo involved only a claim for money damages for past infringements of the right to treatment which is a component of fourteenth

FOOTNOTE CONTINUED ON NEXT PAGE

FOOTNOTE CONTINUED

amendment personal liberty. The Court's decision does not inform at all as to the appropriate reach of injunctive relief for the protection of liberty interests established by state law, and the holding is not necessarily dispositive of the scope of prospective relief for the protection of the fourteenth amendment liberty interests which it recognized. Obviously the problem of hindsight interference with decisions made by hard-pressed professional staff members of state mental institutions is a more serious one than that of assisting them in directing prospective injunctive relief against appropriate state officials. See Edelman v. Jordan, 415 U.S. 651, 667, 94 S. Ct. 1347, 1357, 39 L.Ed.2d 662 (1974).

691 F.2d at 637.

In the present case, plaintiff has been retained at Laurelton since at least 1976 in the face of unanimous professional opinion that should should be transferred to a CLA. The parties have stipulated to this fact. There is also no doubt in my mind that a CLA constitutes a far less restrictive environment than does Laurelton. Although such a restrictive environment may be professionally indicated in some cases, it has not been in plaintiff's case since at least 1976. Indeed, both the staff at Laurelton and at her BSU considered her transfer to a CLA to be an "emergency" matter by 1984. Stipulation ¶¶¶132, 135, 136.

In spite of these continual professional assessments and recommendations, plaintiff remained at Laurelton,

presumably because some agency at either the state or county level did not see fit to allocate or request sufficient funds to secure a CLA for her.

The record in this case speaks for itself. Plaintiff has herself requested transfer to a CLA. This request was mirrored by the recommendations of all those professionals concerned with her well-being and continued growth as a person. All of these recommendations were ignored. As a result, plaintiff remains in an institution which cannot meet all of her needs and which restrains her both physically and emotionally more than is necessary in the eyes of those professionals familiar with her case.

In Youngberg, the Supreme Court determined that an institutionalized mentally retarded person's rights were not violated if she or he was given minimally adequate training and if the conditions of confinement were no more restrictive than that considered necessary by the relevant professionals. In the instant case there is no question concerning whether I should defer to the treatment opinions expressed by plaintiff's treating professionals. There is no dispute concerning the proper treatment plaintiff should receive. This treatment has been denied to plaintiff over the years for reasons unrelated to the treatment of her condition. I therefore conclude that Youngberg commands a

decision that plaintiff's substantive rights have been violated.[14]

This conclusion is strengthened by the Third Circuit's treatment of a similar issue in Scott v. Plante, 691 F.2d 634, 638 (3d Cir. 1982) after the Supreme Court remanded it in light of Youngberg. Scott was a complicated case in which the plaintiff claimed that his constitutional rights were violated when

---

[14]I need not' decide whether the professional judgments made in plaintiff's case "fall within the scope of professional acceptability." Woe v. Cuomo, 720 F.2d at 105. The professional judgments, as opposed to the bureaucratic or administrative judgments, all unanimously support plaintiff's transfer to a CLA. The decisions that were made (or more properly not made) simply ignored these professional judgments.

he was confined in the Trenton State Psychiatric Hospital following a determination that he was incompetent to stand trial. Before Youngberg was decided the Third Circuit had reversed and remanded the judgment entered in the district court in favor of defendants on plaintiff's claims for prospective relief. The court directed that plaintiff's claims to adequate treatment and to be assigned to a less restrictive setting were to be reassessed on remand in the district court. The defendants petitioned for certiorari, however, and the Supreme Court remanded the case to the Third Circuit for further consideration in light of Youngberg.

On remand, the Third Circuit reexamined all of plaintiff's claims to determine the effect of Youngberg In

addressing plaintiff's right to be free from unreasonable restraint the court stated:

> Youngberg v. Romeo holds that a state may not restrain residents of institutions for the retarded or the mentally ill except when and to the extent that professional judgment deems this necessary for the reasonable safety of residents and personnel within the institution, or to provide needed training or treatment... In our last opinion we concluded that a remand was required for consideration of Scott's claim that he should be assigned to some less restrictive setting in the Trenton Psychiatric Hospital. Under the standard announced in Youngberg v. Romeo such a remand is obviously still required.

Scott, 691 F.2d at 638.

I do not believe that the Second Circuit's decision in Society for Good Will to Retarded Children v Cuomo, 737 F.2d 1239 (2d Cir. 1984) compels a different conclusion. In that case, the court reversed a decision of the district court which found that individuals institutionalized at a New York state school had been deprived of due process when the defendants failed to provide enough community placements. The Second Circuit reversed this holding. The basis of the reversal makes clear, however, the ways in which Society for Good Will and the instant case are distinguishable. The district court's decision that plaintiff's rights had been violated was based on a decision that the residents of the institution had a right to live in a setting that provided them with training while being

least restrictive of their liberties. 737 F.2d at 1247. The "least restrictive environment analysis" rested on expert testimony at trial which contradicted the treatment decisions made by institution staff and on a state law right to care and treatment. The Second Circuit found the latter ground foreclosed by Pennhurst State School & Hospital v. Halderman, 104 S. Ct. 900 (1984). It found that the former basis inconsistent with Youngberg's direction to defer to the opinions of treating professionals. It found that the district court had erred in relying on the testimony of expert witnesses to rebut the professional treatment decisions. The Second Circuit interpreted Youngberg as holding that such testimony

could only be relevant to determine whether the treatment decisions made were within acceptable limits. 737 F.2d at 1248-49. In the instant case I have deferred completely to the treatment opinions made by plaintiff's treating professionals. These treatment decisions were never implemented for reasons unrelated to professional assessments of plaintiff's needs. Thus, I conclude that Society for Good Will is not unpersuasive.

I have reviewed plaintiff's constitutional claims with great care. I conclude that her fundamental right to liberty has been denied without due process. I also conclude that she has been institutionalized at Laurelton since

at least 1976 in violation of her substantive rights under the due process clause.[15]

D. Relief

The last issues I must address are those related to the relief plaintiff is seeking. Defendants raise a number of arguments concerning the propriety of the injunctive relief plaintiff seeks. Specifically, they argue that injunctive relief is improper because plaintiff is really seeking "compensation" for past wrongs. In addition they argue that they cannot be ordered to provide plaintiff with a CLA

---

[15]I wish to emphasize, however, the narrowness of this holding. This case has extraordinary facts. These facts necessitate the conclusions I have reached with regard to plaintiff's constitutional claims.

because there are no funds available to pay for one. Both of these arguments are without merit.

The dispute over relief boils down to a basic disagreement over what plaintiff seeks through this injunction and what she has sought to demonstrate in order to obtain the desired relief. Plaintiff has alleged, and proven, that she has been the victim of numerous constitutional violations in the past. She has also alleged, and proven, that she has been the victim of constitutional violations that are ongoing in nature. These ongoing violations are of both procedural due process and substantive due process.

Defendants argue, however, that plaintiff is really seeking some form of compensatory damages in this motion. I disagree with this reading of

plaintiff's case. As long as there are present, ongoing violations of plaintiff's constitutional rights, prospective equitable relief such as that sought by plaintiff is certainly a proper form of remedy. Defendants' argument in this regard is tantamount to saying that no constitutional violation is subject to equitable relief.

Defendants rely on Jaffee v. United States, 592 F.2d 712 (3d Cir.), cert. denied, 441 U.S. 961 (1979). In that case, plaintiff asserted a tort claim against the federal government. The facts of that case, although interesting, are not relevant here. Plaintiff therein sought, inter alia, an injunction ordering the government to provide him with prompt medical care and necessary treatment. The Third Circuit

recognized this claim for what it was: a traditional form of tort damages wrapped up as a request for equitable relief. It therefore affirmed the district court's dismissal of this count of plaintiff's complaint.

The distinctions between Jaffe and the instant case are obvious. Plaintiff herein is the victim of on-going constitutional violations. Although she may receive money damages in compensation for these violations at the trial of this matter, the violations will not be cured unless and until defendants act to remedy them. It is only through equitable relief that plaintiff can be assured that defendants will stop depriving her of her constitutional rights. I therefore find Jaffee completely unpersuasive.

Defendants also argue that the court cannot order that they remedy the constitutional violations identified because they lack the funds to do so.[16] I once again find this argument without merit. As an initial matter, the Commonwealth's position is not supported by the facts adduced at the hearing. The Commonwealth appropriates large amounts of money each year for the provision of mental retardation services. This budget totals more than $500 million. Of that total, roughly $125 million goes to fund community placement programs. Each year money is

---

[16]It appears that although the various counties have the obligation to provide and develop CLAs, the duty to fund them rests with DPW. See In Re Schmidt, 494 Pa. 86, 429 A.2d 631, 634-35 (1981); In Re Sauers, 68 Pa. Commw. 83, 447 A.2d 1132, 1134-36 (Pa. Commw. Ct. 1982).

allocated to the various counties for community placements and each year a certain amount of this allocation remains unspent at the end of the fiscal year. These carryover funds are then reallocated by DPW to other counties. There was about $4 million in carryover funds from fiscal year 1983-84. Moreover, although plaintiff has voiced her desire to be transferred to a CLA and the staff at Laurelton and at her BSU have requested such a transfer, no funds have ever been requested from the legislature to provide for this program. In spite of the fact that plaintiff and others are awaiting CLAs, DPW has not sought an increase in the funding of non-Pennhurst community placements for the next fiscal year. During the early stages of this litigation, the Commonwealth did appear willing to allocate

twenty-seven community placements to Philadelphia County. These were never actually given to Philadelphia, however. Instead, they appear to have been reallocated to other counties. Finally, I must note that the financial burden of placing plaintiff into the CLA identified at the hearing is miniscule. It would cost approximately $2,000 to $10,000 per year for the first two years. After that, the professionals believe that the cost would actually be less than that for keeping plaintiff at Laurelton.

Finally, defendants argument that funding constraints should prevent this court from ordering the relief sought by plaintiff is contrary to logic

and law. See Battle v. Anderson, 564 F.2d 388, 395-96 (10th Cir. 1977), and cases cited therein.[17]

---

[17] On June 19, 1985 at approximately four o'clock p.m., the Commonwealth defendants delivered to chambers a document entitled "Suggestion of Mootness." This document was hand delivered to chambers, but served by first-class mail on plaintiff. It purports to suggest that plaintiff's claim for equitable relief is moot. The basis of this claim is that the County of Philadelphia will have available as of July 1, 1985 funding to provide fifty-four CLAs in "intermediate care facilities for the mentally retarded" for non-Pennhurst individuals. I have reviewed the defendants' memorandum carefully and see no reason to conclude that plaintiff's claim for equitable relief is moot. First, all of the information contained in the "suggestion" as well as the attached affidavit of G. David Smith is of a factual nature and has been in the hands of the Commonwealth for many months. Defendants chose not to present testimony on this matter at the hearing and indeed there was testimony at the hearing that flatly contradicted the facts averred in the "suggestion" and attached affidavit. I see no reason to

FOOTNOTE CONTINUED ON NEXT PAGE

E. Conclusion

A society is perhaps best measured by how it treats those, who through no fault of their own, are forced to rely on its mercy and generosity. The case of Carolyn Clark should make no one feel proud. Bounced from bureaucratic pillar to post, her life is a very symbol of the forgotten

---

reward the Commonwealth for its own dilatory tactics. Second, all of the reasons offered by defendants in its "suggestion" are contingent upon events that may or not occur after July 1, 1985. This is June and none of the events required to moot this case have occurred. I will not deny plaintiff's claim for equitable relief based upon the defendants' conjecture regarding the future funding situation for CLAs in Philadelphia. Finally, there is no way for me to tell what an "intermediate care facility for the mentally retarded" will be. Defendants presented no evidence on this subject and I cannot at this point deny plaintiff's claim on the assumption that such facilities will be essentially the same as the CLAs discussed at the hearing.

among us. But for the then well-intentioned intervention of the state Ms. Clark could most likely have lived an average life. Instead she has been the victim of continual constitutional violations and personal indignities. No remedy I can decree will, at this point, make her completely whole; her entire life to this point has been taken from her.

For the reasons set forth above, I conclude that plaintiff has been denied due process of law and that she has been deprived of rights guaranteed to her under the due process clause. I will therefore enjoin defendants to provide plaintiff with a CLA. An appropriate decree follows. I make the following conclusions of law.

III. CONCLUSIONS OF LAW

1. Jurisdiction of this court is properly invoked.

2 Plaintiff has been deprived of liberty without due process of law.

3. Plaintiff has been deprived of the substantive rights guaranteed to her under the due process clause of the Fourteenth Amendment of the United States Constitution.

4. Plaintiff has not been a subject to discrimination solely by reason of her handicap in violation of the Rehabilitation Act of 1973.

5. Plaintiff is entitled to injunctive relief to remedy the present, ongoing violations of her constitutional rights.

/s/
Daniel H. Huyett, 3rd, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CAROLYN CLARK	:	CIVIL ACTION
	:	
vs.	:	
	:	
WALTER COHEN, et al.	:	No. 84-3383
	:	
	:	

ORDER

AND NOW, this 20th day of June, 1985, upon consideration of plaintiff's motion for a preliminary and permanent injunction, the responses thereto, memoranda of law submitted by the parties, the testimony presented at the hearing, and for the reasons set forth in the accompanying Opinion,

IT IS ORDERED that plaintiff's motion for a permanant injunction is GRANTED.

IT IS ORDERED that:

1. Defendant Surles, his successors, agents, and employees ("County Defendants") and defendant Woods, his successors, agents, and employees, ("BSU defendants") shall immediately plan and develop an appropriate program of community services for plaintiff to enable her to leave Laurelton Center and to reside in a non-institutional setting in Philadelphia County no later than 120 days following the date of this order.

2. Defendant Cohen, his successors, agents, and employees ("State defendants") shall immediately commit to Philadelphia Mental Health Mental Retardation those funds necessary to pay for the program of community services for plaintiff described in paragraph one.

3. State defendants shall immediately forward to Philadelphia Mental Health Mental Retardation those start-up funds necessary to assure that the program described in paragraph one will be available no later than 120 days following the date of this order, and shall forward subsequent funds as necessary to assure the implementation and continuation of this program.

4. State defendants shall cooperate with county defendants and BSU defendants and shall take all steps necessary to assure the development of an appropriate program of community services for plaintiff within 120 days following the date of this order and shall arrange for the transfer of plaintiff to this program.

5. State, County, and BSU defendants shall continue to assure the availability of an appropriate program

of community services to plaintiff, including continued funding by the State defendants, until such time as plaintiff no longer requires such services.

6. State defendants shall file a certification with the clerk of the court that all of the requirements of this order have been met no later than 120 days following the date of this order.

_____

Daniel H. Huyett, 3rd, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CAROLYN CLARK,	:	
	:	
Plaintiff	:	
	:	
v.	:	No. 84-3381
	:	
WALTER COHEN, et al.,	:	
	:	
Defendant	:	

AGREED STIPULATION OF FACTS

The parties whose counsel have signed below hereby stipulate to the truth, but not necessarily the relevance, of the following facts:

Plaintiff

1. Plaintiff Carolyn Clark is an adult citizen of the United States and a resident of Philadelphia, Pennsylvania.

2. Carolyn Clark was born January 22, 1941, and is currently 44 years old.

3. Carolyn Clark is currently living at Laurelton Center, an intermediate care facility for the mentally retarded operated by the Commonwealth of Pennsylvania, Department of Public Welfare.

4. Carolyn Clark was court-committed to Laurelton Center on November 9, 1956 and entered Laurelton Center on November 11, 1956. At all times since that date she has remained committed to Laurelton Center.

Defendants

5. Defendant Walter S. Cohen is the Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania ("DPW") and as such is responsible for the administration and operation of DPW, including DPW's duties

with regard to mental retardation services and facilities. Defendant Cohen has served in the above capacity since March 17, 1983; his predecessor was Helen O'Bannon.

6. Defendant Jennifer L. Howse is the Deputy Secretary for Mental Retardation within DPW and is responsible for carrying out DPW's duties with regard to mental retardation services and facilities. Defendant Howse has served in the above capacity since January 14, 1980; her predecessor was Peter Polloni.

7. Defendant Russell Rice is the Commissioner of Mental Retardation for DPW for the Southeastern Region of the Commonwealth of Pennsylvania, and is responsible for administering, overseeing and monitoring mental retardation services and facilities within the Southeastern Region of Pennsylvania,

including the Philadelphia Mental Health and Mental Retardation Program ("Philadelphia MH/MR"). Defendant Rice has served in this capacity for nine and one half years.

8. Defendant S. Reeve Power is the Superintendent of Laurelton Center and is responsible for the administration of Laurelton Center and for its residents. Defendant Power has served in this capacity since May 24, 1974; his predecessor was Benjamin P. Clark, M.D.

9. Defendant Richard Surles is the Mental Health and Mental Retardation Administrator of Philadelphia County and is responsible for administering Philadelphia MH/MR, and, in cooperation with DPW, for insuring the availability of required services for Philadelphia residents and for maintaining effective liaison with State-operated facilities.

Defendant Surles has served in this capacity since December 1982; his predecessor was Dr. Leon Soffer.

10. Defendant C. Everett Cornman is and has been since September, 1983, the case management supervisor for Philadelphia MH/MR. From August 1979 until September 1983, Cornman was the individual within Philadelphia MH/MR responsible for arranging civil court commitment hearings for residents of the County of Philadelphia who were alleged to be committable to an institution due to mental retardation.

11. Defendant Centralized Comprehensive Human Services, Inc. is the corporation that operates the John F. Kennedy Community Mental Health and Mental Retardation Center ("JFK MH/MR"),

which provides, under contract with Philadelphia MH/MR, mental retardation services to persons with mental retardation in a specified geographical area. JFK MH/MR is the Base Service Unit ("BSU") as defined by 55 Pa. Code 6201.12 for its specified geographic area.

12. Prior to July 1, 1980, Hahnemann Hospital was the BSU for, and provided basic mental retardation services in the geographic area now served by JFK MH/MR.

13. When the responsibility for basic mental retardation services was transferred from Hahnemann Hospital to JFK MH/MR, client files, including that of Carolyn Clark, were also transferred.

14. At the time the responsibility for basic mental retardation services was transferred from Hahnemann Hospital

to JFK MH/MR, Scott McBride, who was employed by Hahnemann Hospital, became an employee of the JFK MH/MR. McBride had been employed by Hahnemann Hospital as case manager for clients, including Carolyn Clark. After he became JFK MH/MR employee, McBride continued to be case manager for Carolyn Clark and others.

15. Defendant James F. Wood is the Executive Director of the JFK MH/MR and has served in that capacity since March 1983. His predecessor from July 1, 1980 through March 1983 was Dr. A. Anthony Arce.

16. Florence Kirchheimer was employed by JFK MH/MR as a case manager for individuals with retardation, including Carolyn Clark, from August 16, 1982 through February 19, 1985. Her predecessor was McBride.

17. Gwendolyn Aribeama is employed by JFK MH/MR as a case manager for individuals with retardation, including Carolyn Clark, and has served in that capacity since April 15, 1985. The Philadelphia Mental Retardation Services System.

18. The Pennsylvania mental retardation service system is authorized and mandated by the Mental Health and Mental Retardation Act of 1966; 50 P.S. 1401 et seq. ("MH/MR Act").

19. The MH/MR Act is the successor act of the Mental Health Act of 1951, as amended, 1954.

20. Both state and county governments have responsibilities for the mental retardation services system.

21. DPW is the state government agency designated by the MH/MR Act to carry out the state's responsibilities under the MH/MR Act.

22. The responsibilities and duties of the state DPW set forth at Section 201 of the MH/MR Act include the duty to ensure the availability and adequate provision of mental retardation services for all persons who need them, to make and enforce regulations to implement the MH/MR Act, to consult with and assist the counties in carrying out their mental retardation functions, to operate state facilities and to supervise mental retardation facilities, services and programs.

23. DPW directly operates state institutions, including Laurelton Center, for persons with mental retardation.

24. Philadelphia MH/MR is the agency responsible for carrying out the county's duties under the MH/MR Act.

25. Pursuant to Section 301 of the MH/MR Act, Philadelphia MH/MR has the duty, in cooperation with DPW, to insure the availability of services to persons with retardation, including rehabilitative and support services and after care services to assist persons after their release from an institution to establish and maintain themselves as members of society.

26. Pursuant to section 6201.12 of the DPW regulations, 55 Pa. Code section 6201.12, Defendant Surles is responsible for establishing an organizational unit or units consisting of multi-disciplinary professional and nonprofessional staff capable of planning, directing,

and coordinating appropriate services for persons who are mentally retarded and in need of services from the county program. These organizational units are known as "Base Service Units" or "BSUs".

27. Philadelphia MH/MR has contracted with several BSUs, each of which is responsible for the provision of services to persons with retardation in a designated geographical area of the City of Philadelphia.

28. JFK MH/MR, one of the BSUs under contract with Philadelphia MH/MR, is responsible for serving plaintiff Carolyn Clark.

29. Pursuant to section 6201.12 of DPW regulations, 55 Pa. Code section 6201.12, JFK MH/MR is responsible for carrying out, inter alia, the following county MH/MR functions:

(a) Intake into the County MH/MR system

(b) After-care to prevent unnecessary and prolonged institutionalization and to facilitate the return of persons to their homes or communities. These services must be designed to enable persons who are mentally retarded to achieve their maximum potential for self-care, self-support, self-sufficiency, and social competence, and must include:

(1) Evaluation of persons currently in residential placement;

(2) Preparation of individual life-management plans for persons in placement, to include a definition of the special purpose served by such placement as part of the life-management plan of each individual;

(3) Establishment of an individually appropriate and realistic social development goal to be accomplished by each placement;

(4) Regular liaison with the facility to ensure that time spent in residence is limited to the time required to accomplish the established goal, and that service provided by the facility is consistently more suitable than the person might receive in the community;

(5) Pre-release counseling services to resident and family, referral with follow-through to appropriate community resources for post-release services, and follow-along responsibility for post-release life management;

(6) Provision of short-term inpatient, emergency, outpatient, partial hospitalization, and rehabilitation and training services, as indicated by individual life-management plans;

(7) Nursing home care for older individuals primarily in need of medically supervised nursing services;

(8) Supervised sheltered personal care living arrangements -- in groups or singly -- for those whose primary need is not medical; and

(9) Foster home care, individual, and group living.

THE PROCEDURE FOR ADMISSION, COMMITMENT AND DISCHARGE AT STATE-OPERATED MENTAL RETARDATION FACILITIES.

30. Individuals with retardation enter state-operated institutions either voluntarily or by court order.

31. Persons over the age of 18 or parents on behalf of persons under 18 may apply for voluntary admission to state- operated institutions pursuant to section 402 of the MH/MR Act.

32. Persons with retardation may be subject to involuntary court-ordered commitment pursuant to section 406 of the MH/MR Act as modified by Goldy v. Beal, 429 F. Supp. 640 (M.D. Pa. 1976); slip op. No. 75-191 (M.D. Pa. October 28, 1976).

33. Petitions requesting court-ordered commitments are filed in the Court of Common Pleas for the county in which the person for whom commitment is sought is or resides.

34. It is the policy of DPW not to be petitioner for commitments pursuant to section 406 of the MH/MR Act.

35. Under DPW policy, it is generally the responsibility of the County MH/MR Administrator to initiate a commitment proceeding.

36. It is now the general policy of Philadelphia MH/MR not to act as the petitioner in proceedings for commitment.

37. Under the current practice, after a petition for involuntary commitment is filed, notice is given to the respondent, an attorney is appointed to represent the respondent and a hearing is held.

38. The MH/MR Act neither expressly sets a definite limit on the duration of a civil court commitment nor expressly requires that commitments be subject to periodic judicial review.

39. DPW's current policy recommends that court commitments be time limited and not exceed one year.

40. It is now the policy of Philadelphia MH/MR that involuntary institutional commitments under section 406 of the MH/MR Act of 1966 should be limited to a period of one year, with a review every six months.

41. It is the current practice of the Court of Common Pleas of Philadelphia County to limit the duration of court ordered commitments for persons with mental retardation to a maximum period of one year.

42. Under the Mental Health Procedures Act of 1976 (50 P.S. 7101, et seq.), involuntary court commitments of persons with mental illness are limited

to specific durations of twenty days, ninety days, 180 days or one year, with periodic reexamination and review by a treatment team occurring at least every thirty days.

43. When a court ordered mental retardation commitment is for a finite term, approximately 3-months prior to the termination of the commitment, the staff at the state-operated facility contact the responsible BSU and request the BSU either to provide an alternate placement or to file a petition for recommitment.

44. Prior to a recommitment or a 6-month review, County office staff examine all records on the committed client and attempt to secure community

placement for that client if the institution or professional evaluators so recommend.

45. If a petition to commit the individual living at Laurelton Center for an additional term is filed, a commitment hearing can be held at Laurelton Center in Union County provided that the individual's county of residence pays the court costs.

46. For hearings held at Laurelton Center in Union County, counties of residence are required to pay the approximately $132 of court costs for a commitment hearing.

47. In circumstances where the state-operated facility recommends discharge to a community placement but the County MH/MR program instead files a petition for recommitment, the hearing process has sometimes been an effective

means of securing a community alternative.

48. If in the course of a commitment or recommitment proceeding it becomes apparent that, according to professional opinion, community rather than institutional placement is appropriate for an individual, the court has sometimes ordered the County to refer the individual for community placement, to give the individual priority on the waiting list for community placement, or to provide the individual with a community placement.

49. From 1976 through the present, Philadelphia MH/MR has placed individuals who had been institutionalized in institutions other than Pennhurst, and who were more severely retarded and had more severe behavioral and/or medical problems than Carolyn Clark, in community residential placements.

50. Since at least 1980, it has become increasingly more difficult to secure a community placement for a Philadelphia County resident who is not a member of the Pennhurst class.

51. At least as early as 1980, it was much easier to place an individual like Carolyn Clark in the community than it is today.

52. It is now extremely difficult to place anyone other than a Pennhurst resident in a community residential program.

53. Persons detained at Laurelton Center pursuant to indefinite court-ordered commitments are not periodically provided judicial review.

54. DPW has no formal procedure through which to initiate judicial review of indefinite court-ordered commitments at state-operated facilities.

55. Laurelton Center does not review persons held on indefinite court-ordered commitments under the currently applicable standards for commitments as set forth in Goldy v. Beal.

56. Philadelphia MH/MR has no written procedure for reviewing indefinite court-ordered commitments.

57. Neither DPW, Laurelton Center, nor JFK MH/MR has an established procedure for initiating judicial review of indefinite court commitments. Until August of 1984, PHiladelphia MH/MR had no established written procedure for initiating judicial review of indefinite court commitments.

58. Neither DPW, Laurelton Center, Philadelphia MH/MR nor JFK MH/MR has an established written procedure for seeking judicial review of an indefinite

court commitment in response to a request by the committed individual, or in response to a determination by professional staff that the individual should not continue to be institutionalized.

STANDARDS FOR INVOLUNTARY COMMITMENT OF PERSONS WITH MENTAL RETARDATION

59. On July 8, 1975, a three-judge court for the Middle District of Pennsylvania in the case of Goldy v. Beal declared section 406 of the MH/MR Act unconstitutionally void for vagueness and enjoined DPW from accepting persons committed under section 406.

60. On October 28, 1976, the Court in Goldy v. Beal, issued a limited stay of its order, to which DPW consented, that permitted the commitment of mentally retarded persons pursuant to section 406 provided specific findings

were made that the person meet the criteria approved by the District Court.

61. On November 13, 1976, DPW incorporated the criteria set out in the Goldy v. Beal stay order into DPW regulations at 55 Pa. Code section 7100. These provided that "the Secretary of DPW and his agents and assigns, those under his direction, and all institution directors shall not receive. . . [persons pursuant to section 406 of the MH/MR Act of 1966] except upon judicial determination that the following standard is met:

"(1) the person is impaired in adaptive behavior to a significant degree and is functioning at an intellectual level two standard deviation measurements below the norm as determined by acceptable psychological testing techniques.

"(2) the impairment and the resultant disability were manifested before the person' 18th birthday and are likely to continue for indefinite period; and

"(3) the person, because of his retardation presents a substantial risk of physical injury to himself or physical debilitation as demonstrated by behavior within 30 days of the petition which shows that he is unable to provide for, and is not providing for his most basic need for nourishment, personal and medical care, shelter, self-protection and safety and that provision for such needs is not available and cannot be developed or provided in his own home or in his own community without residential placement."

FACTS

62. On November 8, 1956, the Deputy Commissioner of the Department of Public Welfare of the City of Philadelphia filed an application for the civil court commitment of Carolyn Clark pursuant to the Mental Health Act of 1951, as amended, 1954.

63. Carolyn Clark, then 15 years old, was a resident of the City of Philadelphia.

64. On November 9, 1956, upon consideration of the application, the Court of Common Pleas of Philadelphia County approved the placement of Carolyn Clark in Laurelton Center (then known as Laurelton State School), pursuant to sections 326 and 328 of the Mental Health Act of 1951, as amended, 1954.

65. Laurelton Center is a state-operated, rurally located institution located in Laurelton (Union County), Pennsylvania, a minimum of four (4) hours from Philadelphia, and housing approximately three hundred and fifty (350) persons with mental retardation.

66. On November 11, 1956, Carolyn Clark entered Laurelton Center.

67. From 1956 to the present, Carolyn Clark's detention at Laurelton Center has been involuntary; at no time did Carolyn Clark agree to remain at Laurelton Center voluntarily.

68. Following Carolyn Clark's admission to Laurelton Center in 1956, no hearing has ever been held regarding her detention there.

69. In 1966, the Mental Health Act of 1951, under which Carolyn Clark continued to be involuntarily detained, was repealed and the Mental Health/ Mental Retardation Act of 1966, 50 P.S. section 4101 et seq. enacted.

70. In a letter dated March 22, 1974, Mrs. Helga Kumar of the Office of Legal Counsel for the Department of Public Welfare advised the then-Superintendent of Laurelton Center, Benjamin P. Clark, that:

a. commitments made under the 1951 MH/MR Act of juveniles do not automatically terminate when the resident reaches majority;

b. commitments under section 326 of the 1951 Act, may be treated as equivalent to section 406 civil commitment under the MH/MR Act; and

c. since a different section of the 1956 MH/MR Act was held unconstitutional, individuals who came under the analagous section of the 1951 Act were not validly committed and were entitled to full and formal hearings and to be represented by counsel.

71. Since at least 1976, Carolyn Clark has desired to leave Laurelton Center and her desire to leave Laurelton

has been continuous. Since at least 1981 Ms. Clark has from time to time specifically requested legal assistance, a hearing, and her release.

72. In the opinion of Pelter and of Elizabeth Keister, Laurelton Center social service staff, Carolyn Clark's need for support services stems primarily from her institutionalization since age 15.

73. Carolyn Clark functions in the mild range of mental retardation. Because of her high functioning levels, Ms. Clark would be more appropriately placed in a community living arrangement than in an institution. She is not typical of the type of individual who is at institutions such as Laurelton.

74. In March, 1972, Carolyn Clark indicated to Helen Keller, her then case worker at Laurelton Center, that she wished to appear before the judge who was then considering the termination of her parental rights to her child in order to retain custody of her child and to secure her release from Laurelton.

75. Carolyn Clark ultimately signed forms to permit the adoption of the child she bore in 1971.

76. On November 10, 1978, James Walter, Jr., then case worker for Carolyn Clark stated that Carolyn Clark requested the staff's assistance in planning to leave Laurelton Center.

77. In 1976, Laurelton Center was reorganized and began to make a more concerted effort to evaluate its residents for discharge into the community.

78. Since at least 1976, it has been the professional recommendation of the team at Laurelton Center that Carolyn Clark be placed in a community living arrangement.

79. Since 1976 the staff at Laurelton Center has made referrals to Hahnemann Hospital and then to JFK MH/MR requesting a community program for Carolyn Clark.

80. JFK MH/MR has no records in its possession concerning Carolyn Clark between the time of her admission to Laurelton Center in 1956 and May, 1976.

81. The BSU received a psychological evaluation of Carolyn Clark dated 5/19/76 in which Carolyn Clark was evaluated and determined to be mildly retarded.

82. In September, 1976, Sandra Showers, Carolyn Clark's case worker at Laurelton Center, referred Carolyn Clark to the BSU for consideration for a community placement. Showers stated in her letter of referral that Carolyn Clark is no longer in need of institutionalization, should be discharged to the community, and that she would appreciate prompt response since Carolyn had been a Laurelton resident for 20 years. She further stated that Carolyn Clark had shown great progress and a desire to leave the institution and return to her home in Philadelphia, and that she would be most appropriate for a supervised foster home or group home placement.

83. On November 22, 1976, Scott McBride, an employee of Carolyn Clark's BSU and her case worker responded to Showers' letter stating that the BSU would not proceed with referral to a community placement unless certain clarifications were made concerning Ms. Clark's behaviors and attitudes.

84. On January 17, 1977, Showers responded to the November 22, 1976 McBride letter addressing the concerns raised by McBride, assuring McBride that Ms. Clark deserves an opportunity to be placed in the community, and suggesting Ms. Clark be brought to Philadelphia for a meeting before making a final decision in her case.

85. On May 6, 1977, McBride wrote to Showers again raising questions about the suitability of discharging Carolyn to a community placement; he concluded,

however, that it might be best for him to meet Carolyn before making any final decision with regard to referring her for discharge.

86. In late 1977, copies of the annual reports prepared by Laurelton Center on Carolyn Clark were forwarded to the BSU. Included was a team report which stated that the team wanted Carolyn Clark's release from Laurelton Center within a year and that Laurelton Center had "no justifiable reason for keeping Carolyn Clark."

87. On March 30, 1978, Ms. Clark was brought into Philadelphia accompanied by Sandra Showers for an interview with her BSU.

88. On May 5, 1978, a copy of the next annual staffing on Carolyn Clark was forwarded to the BSU. Attached to

the annual staffing report was a psychological evaluation dated 6/15/77 which recommended that Carolyn Clark be placed in the community as soon as possible.

89. In June, 1978, McBride forwarded a referral package on Carolyn Clark to Philadelphia MH/MR. In his referral, McBride requested that Ms. Clark's name be submitted for placement in the general community living arrangement (CLA) referral list. He further stated that Ms. Clark was a mildly retarded resident of Laurelton Center who the staff at Laurelton felt was ready for the community.

90. On August 4, 1978, John McMichaels of Philadelphia MH/MR responded to the referral by advising that it was in the file and that she

would be considered if an appropriate opening occurred, although Pennhurst dispersal had priority.

91. In November, 1978, the individual habilitation plan (IHP) for Carolyn Clark was forwarded to her BSU, again recommending her discharge.

92. On May 21, 1979, Ms. Clark and Betty Kiester met with Scott McBride in his office. The possibility of moving into a boarding home in the area cared for by Philadelphia Psychiatric Center was discussed. It was agreed that Carolyn would stay there that night and the matter would be discussed further after that.

93. On May 24, 1979, McBride was advised by Ms. Kiester that the overnight stay at the boarding home had gone well. It was agreed that a trial visit would be scheduled.

94. On or about May 31, 1979, McBride spoke to Philadelphia Psychiatric Center's boarding homes coordinator and also set up an appointment at PARC when Ms. Clark came in for a trial visit.

95. On June 7, 1979, Carolyn came in for a trail visit. She visited PARC and the boarding home with McBride. Carolyn Clark began her trial visit that day.

96. During the trial visit, Carolyn Clark went to a bar, asked to visit her parents and refused to return to the boarding home. As a result it was decided that she would not work out at the boarding homes and on June 11, 1979, she was returned to Laurelton with Ms. Keiter.

97. During the next month, McBride spoke with various family members attempting to get them involved but although they expressed concern, there was no change in the role played by the family.

98. In November, 1979, William J. Delaney, the then Director of Social Services at Laurelton Center invited McBride to attend an annual review and discussion of the individual habilitation plan for Carolyn Clark.

99. On February 3, 1981, McBride, then employed by JFK MH/MR as case manager for Carolyn Clark, forwarded referral materials to Philadelphia MH/MR which stated that Carolyn Clark should be provided a structured program, that she was aware that she did not belong in an institution and had brought this to

the attention of the Laurelton staff, and that she was requesting a judicial review of her commitment.

100. On March 2, 1981, McBride spoke to Carolyn Clark regarding her situation and explained the efforts being made on her behalf.

101. During a series of conversations in the beginning of 1981, and in a letter dated March 31, 1981, Pelter requested JFK MH/MR to secure a community placement for Carolyn Clark because the Laurelton staff was of the opinion that Carolyn Clark did not need to be institutionalized and Carolyn Clark protested her confinement. Pelter requested that JFK MH/MR initiate the appropriate steps to secure a hearing for Ms. Clark.

102. James Pelter is a case worker employed by Laurelton Center who is responsible for providing case work services to approximately 66 Laurelton residents. These services include efforts to secure community placements for those residents.

103. Pelter is the individual at Laurelton Center who coordinates section 406 court commitments for all residents at Laurelton Center.

104. From approximately September, 1979, to December, 1983, Pelter was case worker for Carolyn Clark. Pelter again became caseworker for Carolyn Clark in July, 1984.

105. On October 15, 1981, Mr. Pelter called Rita Levine of Philadelphia Public Defender's Office. Ms. Levine indicated that she would be available to represent Ms. Clark at any

commitment hearings and referred Mr. Pelter to Neil Saggot, Hearing Officer, Phil. to arrange a hearing. Ms. Levine also directed Mr. Pelter to Nat Hoffel, the mental health hearing specialist at Phil. MH/MR.

106. On October 16, 1981, a conference was held among Sagot, Hoffel, and Pelter concerning Carolyn Clark's request for a review or her discharge. During that conversation, Sagot directed Hoffel to initiate a hearing for Ms. Clark. Hoffel indicated that Mr. Cornman was responsible for mental retardation hearings and that the request would be relayed to him.

107. On October 16, 1981, Pelter contacted Cornman of the Philadelphia MH/MR. Cornman indicated that a hearing for Clark would fall within the jurisdiction of the Philadelphia MH/MR and

that a hearing would be arranged for Carolyn Clark and another resident in a similar situation.

108. During the course of the October 16, 1981 conversation Pelter indicated to Cornman that Carolyn Clark had been committed under the 1951 act, that her commitment had never been reviewed and that she was requesting a review so that she could obtain her release from Laurelton Center.

109. In July, 1981, Pelter attempted to have Carolyn Clark transferred to Embreeville Center, a state-operated mental retardation facility approximately 45 minutes from Philadelphia. The purpose of the proposed transfer was to relocate Ms. Clark closer to her resident County, Philadelphia.

110. At the time of the proposed transfer, it was the opinion of Pelter that her major difficulties were in the behavioral area and that these difficulties were largely due to being institutionalized since age 15.

111. The proposed transfer to Embreeville Center was part of an overall effort to have Carolyn Clark placed in the community. It was the opinion of the team at the time of the proposed transfer that Carolyn Clark did not need to be institutionalized and that she had all skills necessary to live in a community living arrangement.

112. In October, 1981, Pelter indicated a series of activities for the purpose of seeking a review of Ms. Clark's commitment. Ms. Clark had been requesting a review of her commitment and Pelter was of the opinion that she had a right to such review.

113. In October, 1981, Ms. Clark was continuing to request discharge from the institution. She requested her commitment be reviewed in order to obtain her discharge. Ms. Clark had observed that other residents who had had their commitments reviewed were later discharged.

114. Ms. Clark's desire to leave the institution has been continuous since at least 1976. She has become very frustrated and agitated at her continuing inability to secure a review of her hearing.

115. On October 19, 1981, Pelter again informed McBride of Carolyn Clark's request for discharge and Pelter's efforts to secure a hearing for her. McBride stated that he would call Levine and Cornman to determine the best course of action.

116. Also on October 19, 1981, Pelter again spoke to Cornman regarding Carolyn Clark.

117. On several occasions during the fall of 1981, Pelter called Mr. Jules Henshell, an attorney in DPW's legal office, and informed him of Carolyn Clark's request for review of her commitment, for discharge, and of the fact that Carolyn Clark's commitment has never been reviewed since 1956.

118. On October 26, 1981, Pelter wrote a letter to Henshell in which he summarized his recent activities on behalf of Carolyn Clark to secure her legal representation, a hearing and/or her discharge.

119. On November 12, 1981, Pelter wrote McBride with a copy to Cornman that Carolyn Clark was becoming impatient for some movement in her request to have her commitment reviewed for a

suitable placement and requesting any information on how to proceed with this matter that McBride could provide. As of that date, Cornman had not provided Pelter with any further information regarding Carolyn Clark's commitment.

120. In December, 1981, Pelter forwarded McBride the annual Laurelton Center staffing on Carolyn Clark, including her IHP for 1982. In his cover letter, Pelter stated that Carolyn was quite insistent about her desire to leave Laurelton Center and that she wanted either community placement or a hearing to review her 1956 commitment.

121. On December 31, 1981, Pelter called Henshell and provided him an update on the efforts to secure a hearing and/or discharge for Carolyn Clark.

122. On January 28, 1982, Pelter again wrote Henshell detailing Carolyn Clark's situation.

123. On July 21, 1982, Henshell requested, in writing, that Philadelphia MH/MR's counsel initiate a judicial review of Ms. Clark's commitment. Henshell noted Carolyn Clark's continuing protests of her commitment and confirmed that the records at Laurelton Center showed no judicial review of her commitment since her initial confinement in November, 1956, at age 15.

124. In a reply letter, Pauline Cohen, Esq., Chief Assistant City Solicitor to the City of Philadelphia, informed Henshell that a request would be made to JFK MH/MR and Philadelphia MH/MR to initiate judicial review of Ms. Clark's confinement.

125. On January 26, 1983, a copy of Carolyn Clark's 1982 IHP was forwarded to her BSU. Included in that referral packet was a social service report prepared by Pelter, dated December 1, 1982, which again confirmed that Ms. Clark's commitment had not been reviewed since her admission on November 15, 1956 and that she continued to request immediate placement or a re-hearing on her commitment.

126. As of December, 1982, Florence Kirchheimer had replaced McBride as case manager for Carolyn Clark at JFK MH/MR.

127. On April 26, 1983, Kirchheimer, in a case summary confirmed that Carolyn Clark continued to demand a hearing for re-commitment and that Cohen had con- cluded that any such review has to be

done at Laurelton Center and that the Laurelton solicitor must initiate contact with Cohen. Kirchheimer also stated that the Clark family no longer had any interest in Carolyn Clark or her future.

128. On May 12, 1983, Kirchheimer forwarded a copy of her case summary to Pelter.

129. On June 8, 1983, Pelter forwarded a copy of Kirchheimer's April 26 case summary to Henshell. In a letter attached to the April 26, 1983, case summary, Pelter told Henshell that Ms. Clark still strongly desired to leave Laurelton and constantly requested legal

counsel to assist her in obtaining her release and placement in the community.

130. In December, 1983, staff at Laurelton met to develop the IHP for Carolyn Clark for 1984; a copy of the IHP and accompanying documents were forwarded to the BSU.

131. In December, 1983, Kirchheimer told Pelter that Philadelphia MH/MR had taken the position that any hearing for Carolyn Clark would have to be held in Union County and that the Laurelton Center attorney must contact Cohen to arrange for payment for the hearing in Union County. During that conversation Pelter informed Kirchheimer that Laurelton did not have an attorney on staff.

132. On May 10, 1984, JFK MH/MR staff referred Carolyn Clark to Philadelphia MH/MR noting on the cover sheet that the referral was an "EMERGENCY!!!." The BSU again informed Philadelphia MH/MR Carolyn Clark had been inappropriately placed at Laurelton Center for several years and that she has independently requested a recommitment hearing from Laurelton and Philadelphia MH/MR, through Cohen and Cornman.

133. In May, 1984, Carolyn Clark refused to consent to continued involvement in her behavior management program at Laurelton.

134. On May 25, 1984, Laurelton Center informed Kirchheimer by letter of Carolyn Clark's refusal to continue behavioral programming and notified Kirchheimer of an individual rights committee meeting on June 21, 1984.

135. On May 30, 1984, Kirchheimer wrote to Philadelphia MH/MR enclosing a copy of the May 24, 1984 letter. Kirchheimer told Philadelphia MH/MR that the matters noted in the May 25th letter emphasized the importance of Carolyn Clark's inappropriate placement and reminded then that Carolyn Clark had been in "emergency status for several years."

136. On June 1, 1984, the Laurelton Center Human Rights Committee met to consider Carolyn Clark's refusal to continue to participate in behavioral programming. The committee recommended that Carolyn Clark's behavior management continue despite her objections. In doing so, the Committee stated that it felt "uncomfortable recommending continuation of a restrictive program for a person who had not had due process after

twenty-eight years of confinement and does so reluctantly. The Committee understands both Ms. Clark's frustration with her situation and the team's need to deal with the results of that frustration. It is, therefore, recommended that the team make every effort to reach agreement with Ms. Clark regarding this program and to eliminate the restrictive portions of the program as soon as possible. The Committee strongly recommends that the facility make every effort to have Ms. Clark's commitment to Laurelton Center reviewed as soon as possible."

137. JFK MH/MR was aware of the decision of the Laurelton Human Rights Committee.

138. On July 19, 1984, Kirchheimer prepared another case summary of Carolyn Clark confirming that at least since 1981

Ms. Clark has been requesting a review of her commitment, that Ms. Clark is aware of her rights and adamant in her feelings that she does not belong in an institutional placement. JFK MH/MR supported Ms. Clark's requests and requested community services for her.

139. In July, 1983, Pelter filed an application for Carolyn Clark's admission to Woodhaven Center. In that application, Pelter stated Carolyn Clark has been institutionalized since age 15 and that her behavioral problems resulted from long term institutional living.

140. Pelter concluded that Ms. Clark's behavior problems resulted from long term institutional living.

141. On August 4, 1983, Pelter requested the Social Security Administration to provide legal representation to Carolyn Clark in her efforts to secure a review of her commitment.

142. On November 10, 1983, Pelter directed a memorandum to his superior James Kodlick, Director Clinical Services at Laurelton Center in which he summarized his activities on behalf of Carolyn Clark.

143. On May 9, 1984, Pelter informed Kirchheimer that Henshell was willing to file a petition seeking authority to detain Carolyn Clark pursuant to section 406 of the MH/MR Act of 1966.

144. In April, 1984, Elizabeth Kiester, an employee of Laurelton Center, drafted a petition requesting authority to detain Carolyn Clark pursuant to section 406 of the MH/MR Act

of 1966 which was never filed. In that petition, sworn to before a notary public on April 2, 1984, Kiester stated "Carolyn was admitted to Laurelton Center on November 15, 1956, under section 326 of the MH/MR Act of 1951, as amended in 1954. This commitment has never been reviewed in Ms. Clark's 28 years at Laurelton Center. Ms. Clark is mildly retarded, possesses all self-care skill and basic academic skills. Ms. Clark is requesting placement in a community residential facility or a review of her commitment . . . the least restrictive environment for Ms. Clark would be a structured community living arrangement and day program. Due to her long institutionalization she could not live independently at this time."

145. No petition seeking authority to detain Carolyn Clark under 406 of the MH/MR Act of 1966 was ever actually filed.

146. Carolyn Clark's living unit at Laurelton Center is a large room broken up by 6 foot high partitions. Two women live in each partitioned section, with a total of 6 to 10 women living in each room.

147. There is no kitchen facility or area in Carolyn Clark's living unit. The residents of her unit eat in a large dining area that serves those residents and others from other living units. All meals are prepared and served centrally.

148. On October 4, 1984, Dr. Paul Spangler, spent between 2 1/2 and 3 hours conversing with and testing Carolyn Clark at Laurelton Center.

Following the testing, he spent some additional time with Ms. Clark as she gave him a tour of Laurelton Center.

149. October 4, 1984, is the first and only occasion on which Spangler met Carolyn Clark.

150. Before his testing of Ms. Clark, Spangler reviewed Ms. Clark's records at Philadelphia MH/MR and JFK MH/MR.

151. After testing Ms. Clark, Spangler reviewed the part of her Laurelton Center files that contained some of her previous psychological and behavioral evaluations. He also interviewed the psychologist for Carolyn Clark's unit, Dr. Zakarin, and Pelter.

152. Spangler administered a Wechsler Adult Intelligence Scale-Revised to Ms. Clark. Her scores on this test were similar to those she achieved on previous administrations of

the test over the years and continue to place her in the mild range of mental retardation.

153. Spangler also performed Vineland Maturity Scale evaluation of Carolyn Clark, using Dr. Zakarin and Pelter as his informants. Spangler did not include the results of this test in his final report because he could not be assured that the information received was complete.

154. Carolyn Clark does not now require institutionalization and there is no clinical contra-indication to her placement in a community living arrangement at this time.

155. Carolyn Clark is higher in intelligence and in functional skills than most of the people with mental retardation that Philadelphia MH/MR now serves in group homes in the community.

156. Carolyn Clark is higher in intelligence and in functional skills that the vast majority of residents at Laurelton Center.

157. In Dr. Spangler's opinion, the structured program recommended by the Philadelphia MH/MR for Carolyn Clark is a transitional one, with totally independent living and working constituting a reasonable goal for her.

158. Carolyn Clark is a Philadelphia resident and the county MH/MR office that is responsible for her is Philadelphia MH/MR.

159. From the late 1960s to the present, there has been a concerted effort by DPW and the county MH/MR offices to get mildly mentally retarded individuals out of institutions and into the community.

160. One of the effects of long term institutionalization on mildly mentally retarded persons is the loss of adaptive skills of day to day living, such as meal preparation. The lack of those skills make the adjustment to community life more difficult.

161. The longer an individual is institutionalized, the harder it becomes to make the transition back to community life.

162. Since September, 1984, Philadelphia Mental Health/Mental Retardation has referred Carolyn Clark for community residential placement to the only three appropriate vacancies in existing community living arrangements. Carolyn Clark was not accepted by any of the three community residential service providers because she needed a behavioral management program which they were unable to provide.

163. Since September, 1984, Philadelphia MH/MR has requested of three separate residential service providers that they develop a community living arrangement program specifically oriented to meet the needs of Carolyn Clark. In March, 1985, one, the Teaching Family Program, agreed to develop such a program and is in the process of doing so.

164. The Commonwealth has not provided financial resources to Philadelphia MH/MR for the expansion of the present number of CLAs in fiscal year 1984-85 beyond that for one hundred (100) residents of Pennhurst Center.

165. If Teaching Family Program develops a plan for a community residential placement for Carolyn Clark, Philadelphia MH/MR would not proceed with implementation of the plan and creation of the community residential

placement unless and until the funds to do so were forthcoming from the Commonwealth.

166. After the filing of this action, Philadelphia MH/MR agreed to secure or develop a community placement for Ms. Clark within current fiscal year, ending June 30, 1985.

167. While Philadelphia MH/MR remains willing to refer Ms. Clark to openings in their CLA program as they become available, Philadelphia MH/MR is no longer assuring that it will develop or secure a placement for Carolyn Clark before the conclusion of the current fiscal year, ending June 30, 1985.

168. It is the policy of DPW to place clients in institutions in close proximity to their county of origin whenever possible. The placement of individuals in close proximity to their

base service unit facilitates the County's monitoring of the individuals' progress, increases the likelihood of continued involvement by the BSU and facilitates discharge.

169. It is the responsibility of the Southeastern Regional Office of Mental Retardation of DPW to ensure that persons who are Southeastern Pennsylvania residents and who are inappropriately residing in State institutions are placed in community programs by their county of origin as quickly as possible.

170. The regional office has no procedure for identifying individuals who have been placed inappropriately in a state institution and does not act on behalf of such individuals unless and until it is affirmatively made aware of the individuals' situation by some other party.

171. Reports recommending the discharge of Carolyn Clark have been shared with the Commissioner in the Central region since 1976. However, the Southeastern regional office which oversees Philadelphia MH/MR was unaware of Carolyn Clark because she had been placed in an institution outside its region. The Southeastern regional office does not as a rule receive the information necessary to initiate its involvement in discharge planning for individuals who are its responsibility but who have been placed in institutions in other regions.

172. The Inspection of Care Surveyors from the Pennsylvania Department of Health conducted a survey of Laurelton Center from August 15, 1983, through September 2, 1983, after which time they

recommended the placement of Carolyn Clark outside of Laurelton Center.

173. The Laurelton Center attempted to use the re-hearing process to try to secure a community placement for Ms. Clark.

174. Laurelton Center is funded inter alia, by state and federal money through the medical assistance program.

175. All records regarding Carolyn Clark in the possession of Laurelton Center, JFK MH/MR and Philadelphia MH/MR have been made available to Carolyn Clark.

176. All records in the possession of Laurelton Center, JFK MH/MR and Philadelphia MH/MR made available to Carolyn Clark's counsel are authentic.

177. In 1969, the staff concluded that Carolyn Clark should be considered for a community placement soon and recommended keeping alive her relationship with a Mrs. Clapper, a family friend, as a possible route back to the community.

178. In 1972, a psychological assessment identified foster home care and sheltered workshop employment as feasible goals for Carolyn Clark.

179. In 1972, Carolyn Clark was referred to a Miss Gollob; a social worker, for a possible community placement in Philadelphia.

180. In 1974, the staff at Laurelton Center again identified sheltered work and living arrangements as goals for Carolyn Clark, stating that her home county had many sheltered workshops and supervised living situations. The staff

also stated, however, that it was uncertain whether she was mature enough in social judgment to handle community living.

181. Since 1981, the social service staff at Laurelton Center repeatedly attempted to secure legal representation for Carolyn Clark, and were instrumental in putting her in touch with advocacy groups and her present counsel.

182. Neither Carolyn Clark nor any person acting on her behalf has attempted to obtain her release from Laurelton Center by way of a habeas corpus action.

183. There are presently no vacancies for females in Philadelphia County in presently existing community living arrangements.

Caryl Oberman, Esq.
Attorney for Plaintiff

John G. Knorr, III, Esq.
Attorney for Defendants
Cohen, Howse, Rice and Power

Martha Gale, Esq.
Attorney for Defendants
Surles and Cornman

Arthur J. Matusow, Esq.
Attorney for Defendants
Centralized Comprehensive
Human Services, Inc.
Woods, and Kirchheimer

Supreme Court, U.S.
FILED
OCT 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-486

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

WALTER S. COHEN, et al.,

Petitioners,

v.

CAROLYN CLARK,

Respondent.

BRIEF OF CAROLYN CLARK IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

*Stephen F. Gold
1315 Walnut Street, Suite 1632
Philadelphia, PA 19107
(215) 735-7200

Ilene W. Shane
Caryl Andrea Oberman
2100 Lewis Tower Building
Philadelphia, PA 19102
(215) 735-6873
Attorneys for Respondent

*Counsel of record.

QUESTIONS PRESENTED

Whether, in the face of the plain and uncontested findings of fact, the lower courts correctly and consistently with this Court's prior decisions held that petitioners violated the procedural and substantive due process rights of a mildly retarded 44-year-old woman who was involuntarily confined for 29 years in a large state institution without any due process reviews, whose continued stay in the institution harmed her, and who could not receive there the minimally adequate treatment unanimously recommended by the treating professionals?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES.....	iii
OPINIONS BELOW.....	2
STATEMENT OF THE CASE.....	2
REASONS FOR DENYING THE WRIT.....	9
I. THE DECISION BELOW IS CONSISTENT WITH THE PREVIOUS DECISIONS OF THIS COURT AND DOES NOT RAISE ANY IMPORTANT QUESTIONS THAT WOULD JUSTIFY REVIEW BY THIS COURT.....	9
II. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH ANY OTHER CIRCUIT.....	20
CONCLUSION.....	23

TABLE OF AUTHORITIES

	Page
Breed v. Jones, 421 U.S. 519 (1975).....	14
Goldberg v. Kelly, 397 U.S. 254 (1970).....	15
Humphrey v. Cady, 405 U.S. 504 (1972).....	13
Jackson v. Indiana, 406 U.S. 715 (1972).....	15
O'Connor v. Donaldson, 422 U.S. 575 (1975).....	14, 15
Parham v. J. R., 442 U.S. 584 (1979).....	15
Phillips v. Thompson, 715 F.2d 365 (7th Cir. 1983).....	20, 21
Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239 (2d Cir. 1984).....	20, 21
Thomas S. v. Morrow, 781 F.2d 367 (4th Cir. 1986), cert. denied sub nom. Kirk v. Thomas S., 106 S.Ct. 1992 (1986).....	21
Youngberg v. Romeo, 457 U.S. 307 (1982).....	17, 19 21, 22

NO. 86-486

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

WALTER S. COHEN, et al.,

Petitioners,

v.

CAROLYN CLARK,

Respondent.

BRIEF OF CAROLYN CLARK IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

Respondent Carolyn Clark respectfully requests that the Court deny the petition for writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 794 F.2d 79 (3d Cir. 1986). Pet. App. 97a.[1] The opinion of the district court is reported at 613 F.Supp. 684 (E.D. Pa. 1985). Pet. App. 3a.

STATEMENT OF THE CASE

Petitioners' Statement of the Case contains many factual inaccuracies, disregards the lower courts' consistent findings of fact, Pet. App. 98a-120a, and ignores many of the 183 "Agreed Stipulation of Facts," Pet. App. 221a-290a. Respondent provides the following summary of undisputed facts.

---

[1]The designation "Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari; "C.A. App." refers to the Appendix filed in the Court of Appeals; and "Stip." refers to the stipulation of facts at Pet. App. 221a, et seq.

Respondent Carolyn Clark is a 44-year-old mildly retarded woman. For twenty-nine years of her life, since she was fifteen years old, she was involuntarily confined to a state retardation institution in Laurelton, Pennsylvania, nearly four hours from her home in Philadelphia. The District Court noted that "[b]ut for the then well-intentioned intervention of the state, Ms. Clark could most likely have lived an average life," Pet. App. 215a.

Between 1956 and 1985, no court reviewed the necessity or propriety of Ms. Clark's commitment,[2] Pet. App. 247a, Stip. 68, despite the fact that she

---

[2]The validity of Ms. Clark's 1956 ex parte commitment, when she received no notice, no counsel, no hearing and no opportunity to challenge either the necessity of commitment or the accuracy of the factual allegations in the petition, Pet. App. 99a, was not argued below and is not at issue in this Court.

repeatedly requested these reviews, Pet. App. 101a; despite the fact that an evaluation done by Laurelton professional staff shortly after her arrival in 1956 disclosed that the diagnosis on which her commitment was based was in error and that she was only mildly handicapped, Pet. App. 100a; despite the fact that she had been committed as a juvenile and reached the age of majority in 1962, Pet. App. 102a; despite the fact that the statute under which she had been committed was repealed in 1966, Pet. App. 101a; and despite the fact that a three-judge federal court in 1976 declared unconstitutional the commitment standard and ordered that more rigorous standards be applied in all involuntary commitments of mentally retarded persons, Pet. App. 176a.

At least since 1976 all professionals working with Ms. Clark, including petitioners' own staff, concluded that there was "no justifiable reason for keeping Carolyn Clark" in the institution, Pet App. 255a, Stip. 86, C. A. App. 266a. Even Laurelton's superintendent, Dr. Power, concluded that at least since 1976 Ms. Clark had "essentially plateaued out at what [the institution] can offer [her]," C. A. App. 266a, and the lower courts found that her "long, illegal confinement at Laurelton without proper treatment caused a deterioration in her ability to function . . .," Pet. App. 16a..

Since 1976, all professionals have agreed that Ms. Clark should be transferred to a facility where she could receive the minimally adequate training she required, Pet. App. 252a, Stip. 78,

treatment she could never receive at Laurelton, Pet. App. 36a-37a, C. A. App. 143a, 233a-235a. The professionals agreed that after a few years of training in the community, Carolyn Clark will live independently with no restraint on her liberty, C. A. App. 147a, 164a, 219a-221a.

At 44 years of age, Ms. Clark had spent all of her adult years in an institution, knowing she did not belong there, Pet. App. 259a, Stip. 99. At Laurelton, she could not make any of the decisions about her life that noninstitutionalized persons take for granted. She had no control over where and how she lived, whom she wanted to befriend, when to wake up and to sleep, and when and what to eat. She had no privacy, and her movements were strictly regulated, Pet. App. 110a-111a, 278a, Stip. 146-147.

She has been in a downward spiral for several years, Pet. App. 112a. In an attempt to control her frustration with her unnecessary confinement and to conform her behavior to that required by institutional life, petitioners subjected her to punishments, restraints and involuntary treatment including, inter alia, restriction to her building, seclusion, and confinement to a "restraint chair," Pet. App. 237a, Stip. 136, C. A. App. 140a, 180a, 189a, where her wrists and ankles were strapped, C. A. App. 190a.

The lower courts found that Ms. Clark would continue to suffer emotional harm as long as she remained at Laurelton, Pet. App. 113a. The Court of Appeals noted that Ms. Clark's institutionalization "caused such deterioration of her ability to cope in society that

she needs some form of supervised remediation if she is ever to be able to do so," Pet. App. 18a. Petitioners have admitted that "[d]ue to her long institutionalization she could not live independently at this time," Pet. App. 277a, Stip. 144, Pet. App. 17a-18a.

On the basis of these facts, both lower courts held that petitioners violated Carolyn Clark's procedural and substantive due process rights. The courts' remedy was exactly what petitioners' professionals had been continuously recommending for the past ten years -- a transfer to a facility where Ms. Clark's deterioration would be halted and where she could receive the minimally adequate training and treatment she needed in order to live without restraint.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS CONSISTENT WITH THE PREVIOUS DECISIONS OF THIS COURT AND DOES NOT RAISE ANY IMPORTANT QUESTIONS THAT WOULD JUSTIFY REVIEW BY THIS COURT

Initially, it is important to correct petitioners' exaggerated and misleading claims regarding the scope of this case and to emphasize what this case is not about:

- Contrary to petitioners' repeated assertions, this case does not raise the question of whether there is a constitutional right to treatment independent of a massive curtailment of liberty by the state. Carolyn Clark has been involuntarily and wrongfully confined by the state in an institution for most of her life. Petitioners have not to this day released her from their care and control and, therefore, have a constitutional duty to provide her with the

minimally adequate training and treatment unanimously recommended by their own professionals. The right to minimally adequate treatment that she asserts goes no farther than that required by the state's invasion of her liberty interest.

• This case does not involve the question of whether a court substituted its judgment for the professionals' judgment regarding treatment for Carolyn Clark. In the present case, for the past ten years the professionals unanimously agreed that she should not be institutionalized but should receive minimally adequate treatment in a different facility.

• Nor does the present case involve, as petitioners suggest, the question of whether a court has legal authority to order services in the "best," "optimal," or "least restrictive"

placement. Petitioners' professionals unanimously agreed that the treatment which Carolyn Clark requires to learn to be free of unnecessary restraint and to regain her liberty could not be provided in Laurelton but only in a community program.

• This case does not raise the issue of the right of all institutionalized mentally retarded persons to community services. It is not a class action, and Carolyn Clark is not typical of mentally retarded persons in institutions, Pet. App. 250a, Stip. 73. Rather, Carolyn Clark has been injured directly as a result of her long instititutionalization and, with minimally adequate training to remediate the deleterious effects of her institutionalization, will live independently with no state-imposed restraints on her liberty.

• Nor does this case present the choice, as asserted by petitioners, between institutionalization and no treatment at all. The existing treatment options made available by petitioners are broader than their false dichotomy suggests. At least since 1976, the state has funded the type of program that was repeatedly recommended for Ms. Clark by petitioners' own professionals, Pet. App. 240a, Stip. 49.

* * *

In fact, this case does not present any important issue (except, of course, for Carolyn Clark). Its result is entirely consistent with this Court's prior decisions. Since the lower courts correctly decided this case, broke no new ground and enunciated no new rules of law, there is no basis for the Supreme Court's review of this matter.

Both lower courts applied this Court's precedents in determining that petitioners had violated Ms. Clark's procedural and substantive due process rights. Petitioners would have this Court believe that the relief ordered was premised solely on petitioners' violations of Carolyn Clark's substantive due process rights. This is simply incorrect. Both lower courts based Ms. Clark's right to relief on the violations of both her substantive and procedural due process rights.

Petitioners have not raised the procedural due process issues in this Court, and indeed cannot do so successfully, given the precedents of this Court. Ms. Clark's commitment to and confinement at Laurelton unquestionably constituted "a massive curtailment of [her] liberty." Humphrey v. Cady, 405

U.S. 504, 509 (1972); O'Connor v. Donaldson, 422 U.S. 563, 575 (1975); Breed v. Jones, 421 U.S. 519, 530 (1975). Because of the magnitude of the state's continued intrusion on her liberty interests for twenty-nine years, Ms. Clark repeatedly requested and was entitled to receive effective periodic reviews of her commitment,[3] either by a court or by an authority that had the

---

[3]Petitioners acknowledged that Ms. Clark's commitment should have been judicially reviewed. See e.g., Pet. App. 260a-268a, Stip. 101, 105-107, 112, 123-124. She did not have her day in court because neither state nor county defendants would pay the $132 court costs, C. A. App. 205a, Pet. App. 239a, Stip. 46, Pet. App. 271a, Stip. 131.

power to implement its decision.[4] Parham v. J. R., 442 U.S. 584, 607 (1979).

Periodic reviews were required to determine whether a reasonable relationship existed between the nature and duration of her commitment and the reasons, if any, that continued to justify her commitment. Jackson v. Indiana, 406 U.S. 715, 738 (1972). In the absence of such a relationship, the commitment could not constitutionally have continued. O'Connor v. Donaldson, 422 U.S. at 475. Both lower courts correctly held that the state did not afford Ms. Clark the constitutionally

---

[4]The lower courts correctly rejected the state's contention that staff reviews resulting in recommendations for change that were never implemented were constitutionally sufficient to meet procedural due process mandates. Meaningless reviews do not rise to the level of the minimal procedures required under the due process clause. See, e.g., Goldberg v. Kelly, 397 U.S. 254 (1970).

required reviews and that, if it had, the nature and duration of her commitment would have been vastly different.[5]

The lower courts' holdings that petitioners violated Ms. Clark's procedural due process rights were based firmly on this Court's precedents. These procedural due process violations are sufficient to affirm the holding in this case, thus making review of the issue raised by petitioners not dispositive of the outcome of the case.

Even if the substantive due process issue were the only basis for the lower courts' decisions, there would be no basis for Supreme Court review. The

---

[5]Had Ms. Clark received periodic reviews, her commitment to Laurelton would have terminated long before she gave up her child for adoption, underwent sterilization, and endured years of restraint, including shackling, Pet. App. 251a, Stip. 75, C. A. App. 190a.

lower courts straightforwardly and properly applied this Court's decision in Youngberg v. Romeo, 457 U.S. 307 (1982), to the facts of this case in granting relief to Carolyn Clark.

In Youngberg, this Court held that mentally retarded persons under state control are "entitled to minimally adequate training." 457 U.S. at 322.

> [A] court may properly start with the generalization that there is a right to minimally adequate training. The basic requirement of adequacy . . . may be stated as that training which is reasonable in light of the identifiable liberty interests and the circumstances of the case.

457 U.S. at 319 n. 25.

In the present case, Ms. Clark's freedom of movement and privacy were unnecessarily and significantly restricted during her years at Laurelton and particularly during the last ten

years. Even though she had the self-care skills and intellectual ability to live in the community, she was punished, restricted to her building, secluded in her room, and kept in a "restraint chair" where she was involuntarily shackled. Most critically, Ms. Clark did not need to be confined to an institution at all and could with training live independently, Pet. App. 253a, Stip. 82, Pet. App. 36a-37a, C. A. App. 147a, 164a, 219a-221a.

Under Youngberg, "courts must show deference to the judgment exercised by a qualified professional," 457 U.S. at 322. In the present case, the lower courts deferentially reviewed the professional judgments. All the professionals agreed that Ms. Clark could never receive the training at Laurelton that would enable her to be free of restraint, and they

unanimously recommended that she be transferred to a short-term, noninstitutionalized program that could provide such minimally adequate training. Petitioners offered no evidence to show why their own professionals' recommendations could not or should not be implemented.[6]

Had the lower courts not required the implementation of the professionals' recommended treatment, it would have been tantamount to condemning Carolyn Clark to a "life sentence" of institutionalization and inadequate treatment, with no possibility of ever regaining her independence.

---

[6]This type of training was available and no more expensive than the undue restraint and inadequate treatment provided to Carolyn Clark at Laurelton, Pet. App. 212a.

Because the lower courts scrupulously applied this Court's mandates in Youngberg to the facts in Carolyn Clark's case, their decisions raise no new or important issues and do not justify the granting of a writ of certiorari.

II. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH ANY OTHER CIRCUIT

Petitioners cite two cases for their contention that the lower courts' opinions conflict with other circuits, Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239 (2d Cir. 1984), and Phillips v. Thompson, 715 F.2d 365 (7th Cir. 1983).

Both Society for Good Will to Retarded Children and Phillips involved broad assertions that all mentally retarded persons could receive better treatment in community programs. In contrast, the present case presents a

very fact-dependent order tailored to the specific injury suffered by, and treatment needs of, a single plaintiff.

In Society for Good Will to Retarded Children and Phillips, there were conflicts in professional judgment about recommended restraint and treatment for the plaintiffs. Carolyn Clark, however, has been detained in a state institution, where she could not receive the treatment she required, against the unanimous judgment of petitioners' own professionals. Each court applied the same standard to very different facts and each reached a result consistent with Youngberg.

All three circuits reviewed the respective injuries and constitutional violations under the Youngberg standard, and all three circuits determined

remedies that were appropriate to their respective cases.

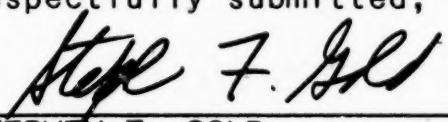
Additionally, this Court last term denied certiorari in Thomas S. v. Morrow, 781 F.2d 367 (4th Cir. 1986), cert. denied sub nom. Kirk v. Thomas S., 106 S.Ct. 1992 (1986), where the Circuit applied the Youngberg standard and affirmed an order requiring the treatment recommended by professionals for the individual plaintiff.

There is no conflict among the circuits on this issue, and thus no basis exists for granting a writ of certiorari in this case.

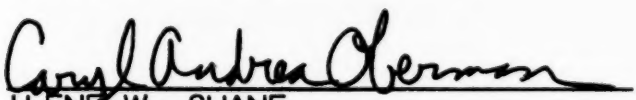
CONCLUSION

Because the instant case presents no important questions that would justify review by this Court and there is no conflict among the circuits, the petition for certiorari should be denied.

Respectfully submitted,



*STEPHEN F. GOLD
1315 Walnut Street, Suite 1632
Philadelphia, PA 19107
(215) 735-7200



ILENE W. SHANE
CARYL ANDREA OBERMAN
2100 Lewis Tower Building
Philadelphia, PA 19102
(215) 735-6873

Date: October 23, 1986

*Counsel of Record.